Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

ALBERTO VALDEZ,

*Petitioner,*

vs.

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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**THIS IS A CAPITAL CASE**

## QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2254(d)(1), as amended by the Anti-Terrorism and Effective Death Penalty Act (the "AEDPA"), requires a federal habeas court to give deference to state habeas court determinations requiring the application of law to fact, even when those determinations are made by a state judge who both lost and refused to consider material portions of the record, thereby making a federal evidentiary hearing mandatory under *Townsend v. Sain*, 372 U.S. 293 (1963) (as modified by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)).

2. Whether a federal habeas court that is required to conduct a federal evidentiary hearing under *Townsend v. Sain* because the state habeas court has refused to provide a full and fair hearing, must then disregard its own conclusions based on the fully developed evidence presented in its own court and instead, under 28 U.S.C. § 2254 as amended by the AEDPA, defer to the determinations of the state court made on an incomplete record.

3. Whether the AEDPA, as interpreted by the court below, violates Article III, the Supremacy Clause, and the Sixth and Fourteenth Amendments to the United States Constitution by potentially foreclosing federal habeas relief even though the petitioner has established a violation of the Sixth Amendment in the only forum in which he has been afforded a full and fair opportunity to present his claim of ineffective assistance of counsel.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Alberto Valdez respectfully prays that a writ of certiorari issue pursuant to 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 3, 2001, the order of the Fifth Circuit denying the petition for panel rehearing on April 2, 2002, and the order of the Fifth Circuit denying the petition for rehearing en banc on April 12, 2002.

## OPINIONS BELOW

The opinion of the court of appeals with one member dissenting is reported at 274 F.3d 941 and is reproduced at App. 1-67. The opinion of the court of appeals denying panel rehearing by a 2-1 vote is reported at 287 F.3d 392 and is reproduced at App. 107-110. The opinion of the court of appeals denying rehearing en banc, with four members of the court dissenting, is reported at 288 F.3d 702 and is reproduced at App. 111-119. The opinion of the district court is reported at 93 F. Supp. 2d 769 and is reproduced at App. 68-106.

## JURISDICTION

The judgment of the court of appeals was entered on December 3, 2001. A timely petition for panel rehearing was denied on April 2, 2002, and a timely petition for rehearing en banc was denied on April 12, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution: Article III, sections 1 and 2; Article VI, clause 2; and the Sixth and Fourteenth Amendments. It also involves 28 U.S.C. §§ 2243 and 2254. The relevant portions of these provisions are reproduced at App. 120-125.

## STATEMENT OF THE CASE

Petitioner Alberto Valdez was convicted of capital murder and sentenced to death in Texas state court in 1988. He filed a state habeas petition in 1990 raising a number of issues, including a claim that his trial counsel rendered constitutionally ineffective assistance in connection with the sentencing phase of his case. Valdez alleged that his appointed trial counsel (who had never before tried a death penalty case at the time of his appointment) had done no investigation in preparation for the sentencing phase, and thus never learned about critical mitigating evidence that any reasonable attorney would have uncovered and presented. This mitigating evidence would have demonstrated that Valdez is mentally retarded, that he overcame a childhood of physical and emotional abuse to become a gentle man who is loved by many, that his criminal background was that of an inept and petty thief rather than a violent offender, and that his behavior in prison was exemplary. Given the strength and totality of this evidence, and given the impulsive rather than premeditated nature of the underlying crime, Valdez alleged that there was a reasonable probability that his trial

counsel's deficiencies severely prejudiced him at the sentencing phase of his trial.

The state habeas court (which did not preside over Valdez's capital murder trial) conducted an evidentiary hearing in November 1990. Nearly seven years later in February 1997, the state habeas court held a hearing to consider proposed findings of fact and conclusions of law. Even though the conduct of Valdez's trial counsel in preparing for and handling the sentencing phase of the trial was at the very center of Valdez's ineffective assistance claim, the state habeas judge stated that he had not reviewed the transcript of the sentencing phase of Valdez's capital murder trial and that he had no intention of doing so. Specifically, the state habeas judge announced on the record: "I have never read the record of the trial and I don't intend to. I don't have the time." (App. 81; 2/28/97 SF 144-45) The state habeas court thereby effectively excluded from consideration some of the most important evidence introduced at the state habeas hearing – the 141-page transcript of the sentencing phase itself. Without reviewing the transcript of the sentencing phase of Valdez's trial, the habeas court had no ability to evaluate the events that took place at trial because he was not the trial judge.

Not only did the state habeas court refuse to review the transcript of the sentencing phase, it also lost many of the most significant exhibits that had been introduced into evidence during the evidentiary hearing in 1990 and thus never considered that evidence in reaching a decision in 1997. These exhibits established that Valdez is mentally retarded, that evidence of his mental retardation was readily available, that Valdez is a caring and conscientious person, and that trial counsel did not investigate Valdez's background. The missing exhibits included IQ scores from

Wechsler tests administered when Valdez was a juvenile, all of which showed him to be mentally retarded. They also included the attorneys' fee applications submitted by Valdez's trial counsel, which showed that they spent only 59 hours total preparing for Valdez's death penalty trial. None of these hours – not one – was spent investigating Valdez's background or preparing for the sentencing phase of his trial. Indeed, the sentencing phase transcript that the habeas court refused to read revealed that Valdez's trial counsel even had to request a brief recess after the State rested during the sentencing phase so that they could "find out" if they had any mitigating evidence to offer. (App. 79)

After hearing arguments in the 1997 hearing concerning the weight and persuasiveness of the evidence that both the state and Valdez had offered in the 1990 evidentiary hearing, the state habeas judge acknowledged that he would need to examine the exhibits, that he could not find them, and that he did not know how many there were. The judge suggested that he would ask counsel to resubmit substitute exhibits if he could not locate the originals. (App. 29, 81; 2/28/97 SF 148-49) Without ever finding the misplaced exhibits or asking for substitutes, however, the state habeas court denied Valdez's petition. Indeed, the court reporter acknowledged two weeks after the state habeas court's ruling that the court's staff had been unable to locate any of the exhibits. (2 R 534-35) Thus, rather than review the evidence, the state habeas court simply signed findings of fact and conclusions of law that repeated virtually verbatim the state's proposed findings and conclusions. (App. 81) The Texas Court of Criminal Appeals affirmed the denial of habeas relief in a one-page order.

Valdez timely filed an application for writ of habeas corpus in the United States District Court for the Southern District of Texas, and simultaneously requested a

federal evidentiary hearing on the ground that the state habeas court had failed to give him a full and fair hearing on his claim of ineffective assistance of counsel. The district court determined that Valdez had not received a full and fair evidentiary hearing in state court through no fault of his own, and held that a federal evidentiary hearing was mandatory under *Townsend v. Sain*, 372 U.S. 293 (1963). The district court found that the state habeas court had refused to examine the transcript of the sentencing phase of Valdez's capital murder trial, even though the state habeas judge had not presided at that trial (and thus was not familiar with what had occurred), and even though what occurred during that sentencing phase was central to Valdez's claim of ineffective assistance of counsel. The district court also found that the state habeas judge had misplaced the exhibits from the state habeas evidentiary hearing and thus had failed to review the critically important evidence found in those exhibits before ruling. (App. 81-84 & n.19)

Based on these findings, the district court held its own evidentiary hearing in which Valdez presented evidence establishing his claim of ineffective assistance of counsel, including the evidence that the state habeas court had effectively excluded from consideration. After considering all the evidence, the district court determined that Valdez had received ineffective assistance of counsel during the sentencing phase of his capital murder trial. (App. 102, 105) The district court concluded that the performance of Valdez's trial counsel was deficient because they had made "essentially no investigation into Valdez's background, even though the vast majority of it was available in Corpus Christi, where Valdez had lived most of his life." (App. 92) The district

court further concluded that Valdez had been prejudiced by the deficient performance, noting that

> the State's evidence of maliciousness and future dangerousness was weak compared to most capital cases. This tragic act of violence appears to have been conceived and completed within a matter of seconds, immediately following a high-speed car chase and a struggle with Bock. Few of the aggravating circumstances that would typically warrant a death sentence were present. . . . Meanwhile, the omitted mitigation evidence was strong. The mental retardation evidence was significant by itself; also, as applied to these particular circumstances, it would have tended to explain Valdez's panic during the incident and his alibi at trial. Further, the evidence of child abuse, gentle character, good prison behavior, and non-violence as a criminal would have strongly fortified the case for mitigation.

(App. 104-105) (footnote omitted)

With respect to the state habeas court's different conclusions on the deficient performance and prejudice prongs of the ineffective assistance standard, the district court concluded that the standards of review found in the AEDPA

> largely do not apply since this Court has held an evidentiary hearing in order to consider evidence improperly excluded from consideration by the state habeas court. . . . [S]ince this Court has held an evidentiary hearing to consider evidence excluded from consideration by the state habeas judge, the Court will not defer to the more general conclusions that the attorneys conducted a reasonable investigation and that Valdez suffered no prejudice from the presentation of a case

> of mitigation. That is, the Court addresses the ultimate conclusion regarding ineffective assistance of counsel without the presumption that the state court's conclusion was correct.

(App. 83-84)[1]

The respondent appealed, and on December 3, 2001, a divided panel of the United States Court of Appeals for the Fifth Circuit vacated the district court's grant of the writ of habeas corpus and remanded the case for further proceedings. The panel majority accepted without deciding the district court's finding that the state habeas court had failed to accord Valdez a full and fair hearing, and that a federal evidentiary hearing was required as a result. (App. 9-10) Nevertheless, the panel majority concluded that the district court had erred in not giving greater deference to the state habeas court's determinations because "a full and fair hearing is not a prerequisite to the application of 28 U.S.C. § 2254's deferential scheme." (App. 1) Thus, for example, the federal district court was required to give deference to the state habeas court's conclusion that the

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[1] The district court applied the 28 U.S.C. § 2254(e)(1) presumption of correctness to the findings of historical fact by the state habeas court, reasoning that none of these findings were tainted by deficiencies in the state habeas proceedings. (App. 84 & n.20) The court further concluded, however, that none of these findings was material to the ultimate questions of deficient performance and prejudice. (*Id.*) By contrast, the district court did not give deference under 28 U.S.C. § 2254(d)(1) to the state habeas court's conclusions on these mixed questions, concluding that the deficiencies in the state proceedings had prevented the state habeas court from making reasonably informed decisions on the question of whether trial counsel had rendered deficient performance and whether that performance had prejudiced Valdez. (App. 84-85)

"testimony of the character witnesses presented on habeas corpus review was cumulative of testimony presented at trial on punishment," even though the state habeas court had never looked at the trial transcript and thus could not know what testimony was "presented at trial on punishment." As the dissent from the denial of rehearing en banc in this case noted, "the only way for the habeas court to *know* what went on at trial is to read the transcript." (App. 112) (emphasis in original)[2]

In dissenting from the panel opinion, Judge Dennis concluded that the AEDPA had not abrogated all pre-AEDPA standards applicable to habeas petitions. In particular, "the AEDPA did not disturb prior law concerning the circumstances in which a federal evidentiary hearing is mandatory. Because *Townsend* still governs that question, the denial of a full and fair hearing must render inoperative the statutory presumption of correctness, just as it did prior to the 1996 amendments." (App. 55) The dissent concluded that:

> My greatest disappointment with the majority opinion concerns my colleagues' apparent belief that silence in the text of the AEDPA signifies affirmative repudiation by Congress of the pre-existing body of habeas corpus law, including "general notions of procedural regularity and substantive accuracy." Although the majority's approach may constitute sound statutory construction in appropriate instances, in the present

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[2] Had the state habeas judge read the trial transcript, he would have discovered – as did the federal district court – that the testimony presented during the sentencing phase was "cursory", "stilted", and the product of "no advance preparation." (App. 73 & n.5, 80) In contrast, the habeas testimony from Valdez's relatives and friends was poignant and powerful.

> case it ignores the delicate balance struck by the Supreme Court among competing concerns of federalism, due process, Article III jurisdiction, faithfulness to Congressional enactments, and the importance of the Great Writ to our legal tradition.

(App. 66-67) (footnotes omitted)

Valdez's petition for panel rehearing was denied in a divided decision on April 2, 2002 (App. 107-110), and his petition for rehearing en banc was denied on April 12, 2002, with four judges writing three separate dissenting opinions (App. 111-119). The principal dissent from the denial of rehearing en banc pointed out that:

> The panel opinion insulates a state habeas court's decision on a federal ineffective assistance of counsel claim, which is highly fact specific, from meaningful review in a federal habeas court without regard to the quality of the state court's fact-finding procedure. But if a full and fair hearing is not a prerequisite to a state court adjudication on the merits that is entitled to deference in federal court under the AEDPA, then state courts are free to (1) rubber-stamp the prosecuting body's proposed findings of fact and conclusions of law, (2) deny the petitioner relief without affording him a hearing, and (3) effectively prevent a federal court from later granting the requested relief. I do not believe the AEDPA left the Great Writ so impotent.

(App. 114)

## REASONS FOR GRANTING THE PETITION

When Valdez was charged with capital murder, the state trial court appointed a lawyer who had never defended a capital murder case, who lacked the initiative to learn what was required, and who prepared for the defense of Valdez's life like one would prepare to defend a traffic ticket. As a result, the jury never learned anything about Valdez's mental retardation and many redeeming attributes, and he was sentenced to death. When Valdez filed his state habeas petition, a different judge admittedly and unapologetically refused to consider the evidence most material to Valdez's ineffective assistance claim because the judge "didn't have the time." Rather than look at the evidence, the state habeas court simply rubberstamped the findings and conclusions prepared by the state. Now, the Fifth Circuit has held that a federal district court – one that has conducted its own evidentiary hearing and carefully considered the evidence – is required nonetheless to give deference under 28 U.S.C. § 2254(d), as amended by the AEDPA, to these rubberstamped findings and conclusions, even though they were made on a record that is indisputably so flawed as to require a federal evidentiary hearing. This holding conflicts with another circuit's interpretation of the AEDPA, is contrary to the language of the AEDPA, eviscerates the Court's decision in *Townsend v. Sain*, and renders the AEDPA unconstitutional as applied to this case. Few issues could merit this Court's review more than the ones presented in this case.

## I. The Fifth Circuit's Decision that the AEDPA Requires a Federal Habeas Court to Defer to State Court Determinations in a Death Penalty Case, Even When Those Determinations Are Made on a Record that is Indisputably so Flawed as to Require a Federal Evidentiary Hearing, Directly Conflicts with the Tenth Circuit's Interpretation of the AEDPA.

The Fifth Circuit held that the AEDPA required the federal district court to give deference to the determinations made by the state habeas court in denying Valdez's claim of ineffective assistance of counsel, regardless of whether Valdez received a full and fair evidentiary hearing in state court on material issues of fact. Without questioning the federal district court's finding that Valdez did not receive a full and fair hearing before the state habeas court, the court below nonetheless held "that a full and fair hearing is not a prerequisite to the application of AEDPA's deferential framework." (App. 15)

This decision breaks new ground on a federal habeas issue of exceptional importance and disregards this Court's caution against interpreting the AEDPA in a manner that produces "far reaching and seemingly perverse" implications for habeas practice. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998). If the court of appeals is correct, a state habeas court can conduct a sham hearing in which the petitioner is deprived of the opportunity to offer any evidence at all and then merely rubberstamp proposed findings submitted by the state, and the federal courts nonetheless will be required to give deference to those findings. To take the Fifth Circuit's holding a necessary step further, a state habeas court

could simply refuse to conduct any hearing at all, even though material facts are in dispute, nonetheless sign the findings of fact proposed by the state, and the federal courts still would be required to give deference to those findings.

The AEDPA simply does not require such an unfair, illogical, and unconstitutional result. Other courts to consider this issue have recognized that nothing in the AEDPA requires a federal court to give deference to a state court determination when the state court has refused to provide the petitioner with a full and fair hearing. Thus, in a post-AEDPA decision, the United States Court of Appeals for the Tenth Circuit held that:

> Although federal courts entertaining habeas petitions must give a presumption of correctness to state courts' factual findings, this presumption of correctness does not apply if the habeas petitioner did not receive a full, fair, and adequate hearing in the state court proceeding on the matter sought to be raised in the habeas petition.

*Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998) (internal quotations and citation omitted). This conclusion has been consistently reaffirmed by later panels of the Tenth Circuit. *See Barnett v. Hargett*, 174 F.3d 1128, 1135-36 (10th Cir. 1999) ("presumption of correctness [under the AEDPA], . . . does not apply when 'some reason to doubt the adequacy or the accuracy of the fact-finding proceeding' exists."); *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir.), *cert. denied*, 531 U.S. 1020 (2000) (factual findings of state court entitled to no deference under the AEDPA because petitioner "was denied an evidentiary hearing into the matter of ineffective assistance").

The Tenth Circuit, in contrast to the Fifth Circuit in this case, concluded that the AEDPA did not alter prior law concerning the circumstances in which a federal evidentiary hearing is mandatory, or the consequences of determining that such a hearing is mandatory, as articulated by this Court in its landmark decision in *Townsend v. Sain*, 372 U.S. 293 (1963). In *Townsend*, the Court concluded that it would make no sense to require a federal district court to conduct its own evidentiary hearing because of material deficiencies in the state court proceeding, yet at the same time require the district court to disregard the fully developed evidence presented in its own court and instead give deference to the decision of the state court made on an incomplete record. 372 U.S. at 316 (if the procedure employed by the state habeas court "appears to be seriously inadequate for the ascertainment of the truth, *it is the federal judge's duty to disregard the state findings and take evidence anew.*") (emphasis added).[3]

Even though nothing in the AEDPA addresses when a federal evidentiary hearing is required, or the consequence of determining that such a hearing is necessary, the court

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[3] One aspect of *Townsend* was overruled in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), where the Court held that a petitioner who has failed to develop a claim in state court proceedings must establish cause and prejudice to receive a federal court hearing. The Court, however, has never questioned the ongoing vitality of *Townsend*'s holding that a petitioner who has not received a full and fair hearing on material issues of fact through no fault of his own is entitled to a federal evidentiary hearing, and that any findings by the state court must be set aside and determined anew. Indeed, this was the law long before *Townsend*. *See, e.g., Ex parte Hawk*, 321 U.S. 114, 116, 118 (1944).

below nonetheless concluded that amended section 2254(d) abrogates *Townsend v. Sain* and requires federal deference to determinations made by a state habeas court, even when that court has refused to look at the evidence. The Fifth Circuit directly acknowledged that this decision creates a conflict with the Tenth Circuit:

> Our sister circuit found that in the absence of a state hearing the petitioner was entitled to a federal evidentiary hearing. More importantly, the Tenth Circuit concluded that the district court should not afford AEDPA's deference to the state court's mixed law and fact conclusions. . . . [I]n reaching its conclusion, the Tenth Circuit did not ground its decision on a reading of the statute, but in reliance on a case applying pre-AEDPA § 2254. Because of the rather tenuous footing of the Tenth Circuit's decision, we decline to adopt its approach.

(App. 24-25)[4]

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[4] Not only did the Fifth Circuit's decision in this case expressly reject the Tenth Circuit's conclusion, it also rejected the conclusions of prior panels of the Fifth Circuit. One prior panel had concluded that the AEDPA does not require deference when the state court failed to conduct a full and fair hearing. *See Singleton v. Johnson*, 178 F.3d 381, 385 (5th Cir. 1999) (federal "de novo" evidentiary hearing required because state courts had denied habeas petitioner "a full and fair evidentiary hearing"). Although the Fifth Circuit in this case characterized as "dicta" *Singleton*'s conclusion that a de novo hearing was required, in fact that conclusion was central to the holding of the court. Other panels of the Fifth Circuit had likewise expressed the same conclusion as *Singleton*. The panel in *Morris v. Cain* recognized that "[a] full and fair adjudication of petitioner's claims is a prerequisite for application of AEDPA's review provisions." 186 F.3d 581, 584 (5th Cir. 1999). Similarly, another panel in *Nobles v. Johnson* noted that "[w]e feel some reservation about applying the more stringent AEDPA

(Continued on following page)

This direct conflict between the Fifth and Tenth Circuits exemplifies an even broader conflict among the circuits regarding the extent to which procedural flaws in state court proceedings impact the standards of deference prescribed by the AEDPA. Thus, the Third and Sixth Circuits have recently determined that a federal habeas court may conduct a de novo review of issues presented by a petitioner when the state habeas court has failed to articulate any rationale for its decision. *See Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000), *cert. denied*, 532 U.S. 924 (2001); *Doan v. Brigano*, 237 F.3d 722, 730-31 (6th Cir. 2001). Several other circuits, in contrast, have reached the opposite conclusion. *See Sellan v. Kuhlman*, 261 F.3d 303, 308-14 (2d Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 157-63 (4th Cir. 2000) (en banc), *cert. denied*, 122 S. Ct. 74 (2001) (overruling prior decision to the contrary in *Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997).

Whether a man or woman sentenced to death receives independent review of his or her federal constitutional claims by a court actually willing to examine the record should not depend on whether that person is sentenced to death in Oklahoma (the Tenth Circuit) or across the state line in Texas (the Fifth Circuit). The issue is one of tremendous importance, not just because the lives of persons condemned are at stake, but also because the quality of the American system of criminal justice is grossly denigrated if

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standards to this claim because we are not convinced that the state habeas court sufficiently addressed [the] claim." 127 F.3d 409, 416 (5th Cir. 1997). *See also Corwin v. Johnson*, 150 F.3d 467, 471 (5th Cir. 1998) ("full and fair adjudication" is a prerequisite to applying § 2254(d)(1) review).

the Fifth Circuit's decision is permitted to stand. This conflict between the circuits is not the sort that should be permitted to fester before it is resolved by this Court.

## II. The Fifth Circuit's Erroneous Decision that the AEDPA Requires Federal Deference to a State Court's Determinations, Even When that Court Admittedly and Unapologetically Refused to Consider the Record, Presents an Important Question of Federal Law that this Court Should Decide.

Prior to the AEDPA's enactment in 1996, a federal habeas petitioner was entitled to a federal evidentiary hearing on material issues of fact whenever the petitioner did not receive a full and fair evidentiary hearing in state court. *See Townsend v. Sain*, 372 U.S. 293 (1963). In *Townsend*, the Court was called upon to interpret 28 U.S.C. § 2243, which provides that in federal habeas proceedings "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."[5] Construing this provision, the Court held that "[w]here the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." *Id.* at 312.

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[5] 28 U.S.C. § 2254(d) has never addressed when a federal evidentiary hearing is required. This issue has instead been addressed in section 2243, as interpreted in *Townsend*. Nothing in the AEDPA changes this.

Moreover, even though state factual determinations were generally entitled to deference,[6] *Townsend* held that when state fact-finding procedures were so deficient as to require a federal evidentiary hearing, federal courts were not to give deference to state court determinations. Otherwise, a federal court would be placed in the entirely untenable position of being required to conduct its own evidentiary hearing because of material deficiencies in the state court proceeding, yet at the same time required to disregard the fully developed evidence presented in its own court and instead defer to the decision of the state court made on a deficient record. Thus, if the procedure employed by the state "appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's *duty to disregard the state findings* and take evidence anew." *Townsend*, 372 U.S. at 316 (emphasis added). This is what "law and justice" require under 28 U.S.C. § 2243 (which was not amended by the AEDPA).

To interpret the AEDPA to now require deference to state court determinations, even when the state court has admittedly and unapologetically refused to consider the evidence, would effect a dramatic, illogical, and unjust change in the substantive law of habeas corpus. As one expert commentator in the law of habeas corpus has observed, a change of the kind that results from the Fifth Circuit's decision in this case

> would be dramatic and not something that anyone would lightly read into the new law. One can imagine that, in some circumstances at least, serious

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[6] *See Brown v. Allen*, 344 U.S. 443, 458, 465 (1953); *Frank v. Magnum*, 237 U.S. 309, 332-36 (1915).

> constitutional questions would be raised by a rule that requires a federal court to accept a factual finding made in state court, with no written statement of the finding on which to focus and with no ability to assess the process out of which that finding emerged and the evidence on which it was based.

Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 140-41 (1996). Before concluding that Congress intended the AEDPA to effect such a change, a court must conclude that Congress has clearly expressed such an intent. *See Keene Corp. v. United States*, 508 U.S. 200, 209 (1993).

Nothing in the language, structure, or legislative history of the AEDPA suggests that Congress intended to override pre-AEDPA standards providing that if the procedure employed by the state habeas court "appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew." *Townsend*, 372 U.S. at 316. Quite to the contrary, the AEDPA simply does not address the issue of when a federal evidentiary hearing is required, or the necessary consequence of conducting such a hearing, when the state courts have failed to provide a full and fair hearing. The AEDPA does identify one circumstance when a federal court is *not* permitted to conduct an evidentiary hearing – when the failure to receive a full and fair evidentiary hearing *is the petitioner's fault*. *See* 28 U.S.C. § 2254(e)(2). But amended section 2254 does not address either explicitly or implicitly what happens when a state habeas court, like the one here, has admittedly and unapologetically abdicated its responsibility to fully and fairly hear federal constitutional claims. Indeed, the

AEDPA did not amend the hearing provisions found in 28 U.S.C. § 2243, which provided the basis for the *Townsend* decision and have remained substantially unchanged since enactment of the Habeas Corpus Act of 1867. For these reasons, until the decision by the court below, courts had consistently held that pre-AEDPA standards as articulated by this Court in *Townsend* continue to apply under the AEDPA when a state court has failed to provide a full and fair hearing.[7]

If anything, the language in amended section 2254(d) demonstrates that Congress did *not* intend for federal courts to give deference to state court factual determinations based on processes so incomplete and flawed that federal evidentiary hearings are required. Section 2254(d)(2) provides that deference is owed to factual determinations unless the adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding.*" (emphasis added) This provision must be reconciled with section 2254(e)(2), which

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[7] *See, e.g.*, *Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998); *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000) ("pre-AEDPA jurisprudence is instructive in evaluating whether the district court's denial of discovery and an evidentiary hearing was an abuse of discretion."); *Corwin v. Johnson*, 150 F.3d 467, 471 (5th Cir. 1998) ("In this Circuit, provided the state court conducted a full and fair adjudication of the petitioner's claims, pure questions of law and mixed questions of law and fact are reviewed under § 2254(d)(1)."); *see also* Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. at 140 ("the 1996 Act does not disturb prior doctrine regarding the circumstances in which a federal habeas court must or can conduct a federal evidentiary hearing into the facts underlying a prisoner's claim. The part of *Townsend* governing that question remains intact.").

expressly recognizes the possibility of a federal evidentiary hearing where a federal court may develop a more complete body of evidence than was considered by the state court. That being so, it would be utterly inconsistent to read section 2254(d)(2) to make that additional evidence irrelevant – to require a federal court to conduct an evidentiary hearing because the state court had failed to conduct a full and fair hearing, but then require the federal court to disregard what it just heard. Ignoring this inconsistency, the court below concluded that additional evidence developed in a federal evidentiary hearing can be considered in determining whether state court determinations are "unreasonable" under section 2254(d) (App. 21-22), despite the language in section 2254(d)(2) limiting inquiry to "the evidence presented in the State court proceeding." Rather than ignore the plain language of the statute as did the court below, the obvious way to reconcile sections 2254(d)(2) and (e)(2) is to conclude that the section 2254(d) deference provisions apply *unless* a federal evidentiary hearing is mandated by the state court's refusal to provide a full and fair hearing.

Other provisions in section 2254(d), as amended by the AEDPA, likewise confirm that federal courts are not required to give deference to determinations made by state courts that have refused to conduct full and fair hearings. Section 2254(d)(1) requires deference to state court decisions on mixed questions requiring the application of law to fact (like the deficient performance and prejudice questions at issue here), unless the decision involved an "unreasonable application" of law to fact. Likewise, section 2254(d)(2) requires deference to state court findings on questions of fact, unless the finding was based on "an unreasonable determination" of the facts. When a determination

of fact or application of law to fact is based on a state court process that is seriously inadequate for the ascertainment of the truth – such as a determination or application made without considering the evidence – that determination is demonstrably "unreasonable" within the meaning of the AEDPA.

Indeed, as Professor Yackle has observed, section 2254(d)'s requirement that determinations of fact and applications of law to fact be reasonable means that "a federal court can scarcely be indifferent to the process by which a state court reached a factual finding or the evidentiary support that finding enjoys." Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. at 140-41. This same commentator concluded that the AEDPA cannot be read "to dispense with a federal court's rudimentary responsibility to ensure that it is deciding a constitutional claim based on factual findings that were forged in a procedurally adequate way and were anchored in a sufficient evidentiary record." *Id.* Likewise, other leading habeas experts have concluded that:

> section 2254(d)(2) divides "determinations of the facts" into two categories – state court factfindings that are flawed because they are "unreasonable," hence are a basis for habeas corpus relief without more; and findings that are not flawed because they are "[ ]reasonable," hence are presumed to be correct unless the petitioner proves otherwise "by clear and convincing evidence."

1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 20.2c, at 751 (3d ed. 1998 & Supp. 2000). These commentators agree that there would be no appreciable difference between a reasonableness

inquiry under the AEDPA and the traditional inquiry into whether the state court provided a full and fair hearing. *Id.*[8]

In this case, the state habeas court could not have made a "reasonable" determination of facts or a "reasonable" application of law to facts without at least looking at the transcript of the sentencing phase of Valdez's capital murder trial. This Court has emphasized "the importance of reviewing capital sentences on a complete record." *Dobbs v. Zant,* 506 U.S. 357, 358 (1993). Thus, *Dobbs* held that a federal habeas court committed reversible error by refusing to examine the transcript of the sentencing phase of a capital murder trial to evaluate the petitioner's claim of ineffective assistance of counsel. In words equally applicable to this case, the Court explained:

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[8] Not only does the AEDPA require deference to only "reasonable" determinations of fact and applications of law to fact, the AEDPA further specifies that only state court "adjudications" on the merits are entitled to deference. As Judge Wiener noted in dissent from the denial of rehearing en banc in this case:

> When, as here, the state *habeas* judge delays a determination for six years of inaction between two perfunctory hearings, loses the exhibits in the meantime, and announces that he is too busy to acquaint himself with the case by reading the trial transcript, we cannot credit that judge's putting pen to paper and rubberstamping the state's proposed findings as being an "adjudication on the merits."

(App. 118) There simply cannot be an "adjudication" of disputed questions of fact and application of law to fact within the meaning of the AEDPA without a full and fair hearing. The conclusion of the court of appeals to the contrary reduces federal habeas review to "nothing more than a search for the state judge's signature – a classic example of exalting form over substance." (App. 118)

> There can be no doubt as to the transcript's relevance, for it calls into serious question the factual predicate on which the District Court and Court of Appeals relied in deciding petitioner's ineffective assistance claim.

*Id.* at 359; *see also Magouirk v. Phillips*, 144 F.3d 348, 363 (5th Cir. 1998) ("We are at a loss to understand how a federal habeas court can conduct a meaningful sufficiency review without a transcript of [the] trial.").

Despite the obvious necessity of learning what happened during the sentencing phase of the trial to evaluate Valdez's claim of ineffective assistance, the state habeas judge (who did not preside over the trial) stated: "I have never read the record of the trial and I don't intend to. I don't have the time." (2/28/97 SF 144-45) And then to make matters worse, the state habeas judge lost the most important exhibits – which had been introduced nearly seven years earlier during the state evidentiary hearing – but made his ruling anyway. These exhibits established that Valdez is mentally retarded, that evidence of his mental retardation was readily available, that Valdez is a caring and conscientious person, and that trial counsel did not investigate Valdez's background. Without looking at the actual sentencing phase of the trial and comparing it to the sentencing phase that could have been conducted with available mitigating evidence, the state habeas court was in no position to perform the thoughtful analysis required by this Court in decisions like *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000).

Although the court below seemed to accept the district court's conclusion that the procedures employed by the state habeas court were not "full and fair," the court concluded that it simply did not matter under the AEDPA

because the procedures employed by state courts are effectively immune from review under the AEDPA. What this conclusion overlooks, however, is that the state habeas court could not make "reasonable" determinations of material facts or "reasonable" applications of law to fact within the meaning of the AEDPA given the astounding flaws in the process used to reach its decisions.

The court below reasoned that unless the deference provisions in section 2254(d), as amended by the AEDPA, are interpreted to apply even when the state habeas court has refused to consider the evidence, the changes to the standard of review effected by the AEDPA and reflected in sections 2254(d) and (e) would have no effect. (App. 17-19) But this is simply not the case. Prior to enactment of the AEDPA, state court determinations on questions that required the application of law to fact (such as the deficient performance and prejudice questions under *Strickland*) were entitled to no deference at all. *See, e.g.*, *Miller v. Fenton*, 474 U.S. 104, 112 (1985); *Thompson v. Keohane*, 516 U.S. 99, 111 (1995). Under the AEDPA, these state court determinations are given deference unless they are "unreasonable." *See* 28 U.S.C. § 2254(d)(1); *Williams (Terry) v. Taylor*, 529 U.S. at 410. Likewise, prior to the AEDPA's enactment, any error by a state court on a pure question of federal law could be reviewed de novo by federal courts. Under the AEDPA, however, only errors of "clearly established Federal law" as determined by this Court can be reviewed by federal habeas courts. *See* 28 U.S.C. § 2254(d)(1). Finally, the AEDPA preserves the presumption of correctness that applied to factual determinations by state courts under the previous version of section 2254. *See* 28 U.S.C. § 2254(d)(2), (e)(1). All of these statutory changes can and will be given full effect – as

long as state courts provide full and fair hearings before determining issues of fact material to federal constitutional claims.

The court below also based its decision on the fact that prior to the AEDPA, section 2254(d) had expressly provided that a presumption of correctness would apply to state court factual determinations, unless one of eight listed exceptions applied. One of these exceptions applied if the state court failed to conduct a full and fair hearing. Because the AEDPA eliminated from section 2254(d) any reference to these exceptions, the court below reasoned that Congress intended to make the deference provisions included in amended section 2254(d) absolute – that Congress consciously decided that federal courts must defer to state court determinations, even when the state court refuses on the record to consider the evidence presented. (App. 17-19) While this is conceivably one possible – albeit far-fetched – explanation for why the exceptions may have been deleted from section 2254(d), there are far more plausible explanations.

The exception that applied when the state court had failed to conduct a full and fair evidentiary hearing had been the law under *Townsend* before it was ever included in former section 2254(d), and in this sense its inclusion in that section in 1966 was unnecessary. When Congress enacted the AEDPA and thereby expanded the deference provisions in section 2254(d) to now apply to pure questions of law as well as questions of fact, the exceptions listed in former 2254(d) no longer made sense as applied to these purely legal determinations. The fact that a state habeas court had failed to conduct a full and fair evidentiary hearing, for example, should not affect how much deference is given to the state court's determinations on

pure questions of law under section 2254(d)(1) because those questions do not require evidence to resolve. Given that the express exceptions found in former section 2254(d) were a poor fit under the amended statute, and given that they had always been unnecessary because of *Townsend* when state courts had failed to conduct a full and fair hearing, they could be deleted without changing pre-AEDPA standards. Moreover, by adding the requirement of reasonableness into the standards of deference, Congress necessarily incorporated the general concepts that were previously embodied in the specific exceptions.

To be sure, amended section 2254 would be clearer if the statute expressly stated that the standard of review provisions found in subsections (d)(1), (d)(2), and (e)(1) do not apply when the determinations of a state habeas court are made on a record that is so flawed as to require a federal evidentiary hearing. But statutory silence cannot reasonably be interpreted to signify a wholesale repudiation by Congress of pre-AEDPA standards. The short of the matter is that the interpretation of the AEDPA adopted by the Fifth Circuit creates an inexplicable anomaly in which a federal district court is required to conduct its own evidentiary hearing because of material deficiencies in the state court proceeding, yet at the same time must disregard the fully developed evidence presented in its own court and instead defer to the decision of the state court made on a seriously flawed record. Not only is this illogical and unfair result contrary to section 2243 as interpreted in *Townsend*, it is neither required nor even permitted under the plain language of section 2254. Given the threat posed by the Fifth Circuit's decision to habeas petitioners' ability to obtain meaningful review of federal constitutional claims when state habeas courts have abdicated

their responsibility to give that review, one can scarcely imagine a more important question of federal law that should be settled by this Court.

## III. Whether the Fifth Circuit's Decision Renders the AEDPA Unconstitutional Presents an Important Question of Federal Law that this Court Should Decide.

A "cardinal principle" of statutory construction requires that if it is "fairly possible" to construe an act of Congress to avoid a constitutional question, then the statute should be interpreted in that way. *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994). The court below violated this cardinal principle. By holding that the AEDPA prohibits a federal court from examining the process by which the state habeas court arrived at its decision, the Fifth Circuit has interpreted the AEDPA in a manner that renders it unconstitutional.

To begin with, the Fifth Circuit's expansive interpretation of the AEDPA's deference provisions renders the statute unconstitutional under the Sixth and Fourteenth Amendments as applied to this case. This Court has held that a defendant's Sixth Amendment right to counsel is violated when counsel renders ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To establish a Sixth Amendment violation under *Strickland*, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness," and "that the decision reached would reasonably likely have been different absent the errors." *Id.* at 688, 699. The petitioner must show deficient performance and prejudice under *Strickland* by a preponderance of the evidence.

The Court in *Strickland* also held that these same standards apply regardless of whether the ineffective assistance of counsel claim is raised on direct appeal, in connection with a motion for new trial, or in federal collateral proceedings. 466 U.S. at 700. Indeed, because the lawyer who rendered ineffective assistance typically continues to represent the defendant through direct appeal (as was the case here), and because that lawyer cannot reasonably be expected to raise his own ineffectiveness, claims of ineffective assistance ordinarily can be raised only in collateral habeas proceedings. Furthermore, because the state habeas court in this case refused to fully and fairly hear Valdez's ineffective assistance of counsel claim, his first full and fair opportunity to have that claim heard was in his federal habeas proceeding.

The constitutional problem here is that the Fifth Circuit's interpretation of the AEDPA forces Valdez to show more than what *Strickland* requires to establish an ineffective assistance of counsel claim – and it requires him to make this additional showing in his first full and fair opportunity to present that claim. Although Valdez has demonstrated to a federal habeas court that his trial counsel's performance was deficient and that it prejudiced him, the Fifth Circuit's interpretation of the AEDPA means that Valdez nonetheless may be foreclosed from habeas relief unless he can also demonstrate that the state habeas court's determinations of "no deficient performance" and "no prejudice" were "unreasonable". The Fifth Circuit's decision thus creates the unacceptable anomaly that Valdez might not be entitled to federal habeas relief, even though he has established a violation of the Sixth Amendment under the *Strickland* standard in the only forum in which he has been afforded a full and fair opportunity to present that claim. By increasing Valdez's burden of proof beyond what

the Sixth Amendment requires – effectively requiring Valdez to show both "prejudice plus" and "deficient performance plus" – the court of appeals' interpretation of the AEDPA violates the Sixth Amendment standards recognized by this Court in *Strickland*. *See Cooper v. Oklahoma*, 517 U.S. 348, 364-65 (1996) (statute unconstitutionally increased the defendant's burden in establishing incompetence to stand trial).

Moreover, the Fifth Circuit's interpretation of the AEDPA violates due process, the Supremacy Clause, and Article III, in that it requires federal courts to subordinate themselves on issues of federal constitutional law to state courts, even when those courts have refused to give a full and fair hearing to these federal issues and thus have erroneously decided matters of federal law. In the closely related context of claim preclusion, this Court has held that federal courts need not respect state court judgments unless litigants had a full and fair opportunity to litigate their claims in state court. At a minimum, the measure of that opportunity is due process in the constitutional sense. *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982). As Judge Dennis noted in his dissent from the decision of the court below, these same due process concerns "apply with equal force to the present case." (App. 60); *see also* Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. at 141 n.21.

The Fifth Circuit's interpretation of the AEDPA also violates Article III and the Supremacy Clause. The habeas corpus statute requires Article III courts to determine whether a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States," and whether the state court decision on the merits of that federal question "was contrary to, or involved an unreasonable application

of, clearly established Federal law." *See* 28 U.S.C. §§ 2241, 2254. Despite this conferral of "federal question" jurisdiction – to which the "judicial Power shall extend" – the Fifth Circuit's interpretation of the AEDPA requires an Article III court to give force and effect to a state court decision on a question of federal law that the federal court has already determined is erroneous. Having been required to independently review the evidence because the state court refused to provide a full and fair hearing and having found that the evidence gives rise to a federal constitutional violation, the federal court cannot then be required to defer to a state court decision that is inconsistent with "the supreme Law of the Land." That requirement flatly violates Article III and the Supremacy Clause of the United States Constitution and would, therefore, render the AEDPA unconstitutional. The constitutional questions raised by the Fifth Circuit's interpretation of the AEDPA are important issues of federal law meriting this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submited,

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**Alberto VALDEZ, Petitioner-Appellee,**

**v.**

**Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellant.**

**No. 99-41216.**

United States Court of Appeals,
Fifth Circuit.

Dec. 3, 2001.

Jeffrey Scott Levinger (argued), Carrington, Coleman, Sloman & Blumenthal, Dallas, TX, William David Underwood (argued), Waco, TX, for Petitioner-Appellee.

Gregory Scott Coleman (argued) Lisa Royce Eskow, Meredith Bishop Parenti, Asst. Sol. Gen., Austin, TX, for Respondent-Appellant.

Appeals from the United States District Court for the Southern District of Texas.

Before DAVIS, EMILIO M. GARZA and DENNIS, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Janie Cockrell, Director of the Texas Department of Criminal Justice, Institutional Division ("the Director"), appeals the district court's grant of the writ of habeas corpus to the petitioner, Alberto Valdez ("Valdez"). We hold that a full and fair hearing is not a prerequisite to the application of 28 U.S.C. § 2254's deferential scheme. Therefore, we vacate and remand to the district court for an assessment of Valdez's claims applying the standards set forth in § 2254(d) and (e)(1). With respect to the Director's

appeal of the district court's evidentiary rulings, we affirm in part and vacate in part.

I

A Texas jury found Valdez guilty of the capital murder of Police Sergeant J.D. Bock in May 1988.[1] Following the sentencing phase, the jury answered the two special issue questions in the affirmative, finding that the act had been deliberate and that Valdez posed a future danger to society.[2] The court then imposed a sentence of death. Valdez's conviction and sentence were affirmed on direct appeal. *See Valdez v. State,* 776 S.W.2d 162 (Tex.Crim.App.1989) (en banc), *cert. denied, Valdez v. Texas,* 495 U.S. 963, 110 S.Ct. 2575, 109 L.Ed.2d 757 (mem.), 495 U.S. 963, 110 S.Ct. 2575, 109 L.Ed.2d 757 (1990).

Valdez filed a state habeas petition, raising twenty-four legal issues. The state habeas court held a two-day hearing in November of 1990. At this hearing, Valdez presented evidence of his ineffective assistance of counsel claim.[3] Valdez's theory was that if his trial counsel had

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[1] For a recitation of the facts surrounding the crime and the testimony at trial, see *Valdez v. State,* 776 S.W.2d 162 (Tex.Crim.App.1989) (en banc).

[2] The special issues submitted to the jury were: (1) was the conduct of the Defendant, Alberto Valdez, that caused the death of the deceased, Joseph Bock, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?; (2) is there a probability that the Defendant, Alberto Valdez, would commit criminal acts of violence that would constitute a continuing threat to society? *See* Tex.Crim.Pro.Code Ann. Art. 37.07(b) (Vernon 1981).

[3] Valdez also presented testimony regarding his juror misconduct claim. He alleged that one juror visited the crime scene during the trial.

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investigated his background, they would have found significant evidence that Valdez was mentally retarded, suffered abuse as a child at the hands of his father, and had behaved as a model prisoner during his previous periods of incarceration. Valdez argued that had the jury heard such evidence there was a reasonable probability that the jury would have answered one of the special questions differently, sparing his life. After the presentation of witnesses, the hearing recessed to allow both parties to secure additional witnesses if necessary.

On a motion by the parties to close the proceeding, the state habeas court held a final hearing on the proposed findings. During that hearing, counsel for Valdez and the State presented lengthy arguments as to those findings. One month later, the state habeas court issued findings of fact and law denying Valdez relief.

The state habeas court held that Valdez's trial counsel was not deficient and that any deficiency did not prejudice Valdez. The habeas court found that the trial counsel's lack of investigation into Valdez's background was reasonable. School records, admitted into evidence during the hearing, indicated that Valdez had a full scale I.Q. of 73 and had been classified as educable mentally retarded. The court found that the fact that Valdez had dropped out of school did not put his counsel on notice to inquire into these school records because it found that it was common for Hispanic males in the Corpus Christi, Nueces County, Texas area to drop out of school. With regard to a conviction

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The state habeas court found this claim to be without merit. Likewise, the federal district court found this to be without merit. This claim is not before us on appeal.

in Hockley County, trial counsel had received the penitentiary packet containing the conviction and judgment but had not requested the underlying pleadings. These pleadings contained a letter from his attorney in that case requesting a psychiatric evaluation of Valdez, and the resulting evaluation, which would have also shown that Valdez had a full scale I.Q. of 63 and was determined to be of borderline intelligence. The state habeas court concluded that the failure to request these pleadings did not fall beyond the professional standard of conduct for defense attorneys. Moreover, the state habeas court found that the defendant had knowledge of this psychological testing and had not made it known to his attorneys.

As for the presentation of witnesses regarding Valdez's childhood background and other humanizing elements, the court also rejected the claim that counsel had been deficient. The habeas court found that Valdez's "drug use, childhood abuse and hardship, creativity, artistic talent, kindliness towards family was known and available to the applicant at the time of trial." *Ex parte Valdez,* No. 87-CR-1459-B at 10 (117th Dist. Ct., Nueces County, Tex., Mar. 31, 1997) (unpublished). Furthermore, the court found that "evidence of kindness and family assistance was presented at the punishment phase by the testimony of applicant's brother Daniel Valdez, Mary Jane Barrientes, Julie Saldana, and Maria Saldana." *Id.* In light of these facts, the habeas court concluded that the additional witness testimony offered during the habeas hearing on these matters would have been cumulative and the failure to present this evidence was "a decision of trial strategy which was sound and reasonable as judged at the time of the trial." *Id.* at 11. More generally, the state habeas court found that trial counsel "exercised reasonable and sound

judgment in deciding which individuals to present as punishment witnesses." *Id.* at 8. Finally, without specific findings of historical fact, the state habeas court concluded that trial counsel's failure to present the mitigating evidence offered in the habeas hearing had not prejudiced Valdez. The state habeas court reached no conclusion as to whether Valdez was mentally retarded, noting that it rejected Valdez's Eighth Amendment claim "without deciding the issue of Valdez's mental retardation." *Id.* at 19.

Based on these findings and conclusions, the Texas Court of Criminal Appeals affirmed the denial of habeas relief in a one-page order. *See Ex parte Valdez,* Application No. 31,184-01 (Aug. 13, 1997) (unpublished order). The 117th District Court of Nueces County set Valdez's execution for January 14, 1998. The United States District Court for the Eastern District of Texas granted Valdez a stay of execution and appointed counsel.

Valdez then filed the instant § 2254 petition in the United States District Court for the Southern District of Texas and requested an evidentiary hearing. The district court granted Valdez an evidentiary hearing with regard to his ineffective assistance of counsel claim. It did so because it determined that Valdez had not received a full and fair hearing before the state habeas court. Because Valdez had not received such a hearing, the district court concluded that, under *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), an evidentiary hearing was mandatory.[4]

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[4] In *Townsend,* the Supreme Court held that where a petitioner shows the existence of a genuine dispute of material fact, which if

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The district court determined that the state habeas court denied Valdez a full and fair hearing because the state habeas court lost the exhibits admitted into evidence during the hearing, and, as a result, excluded those exhibits from its resolution of Valdez's case. These lost exhibits included: (1) the results of intelligence tests conducted on Valdez at age thirteen by the Corpus Christi School District; (2) the results of intelligence tests conducted on Valdez at age eighteen by the Big Spring State Hospital, and the accompanying psychiatric evaluation issued by the hospital; and (3) the fee applications submitted by Carl Lewis and David Gutierrez, his trial counsel. The district court also found that "it appear[ed] that other crucial evidence was excluded from proceedings," namely, the trial transcript, as the state habeas judge informed the parties at the hearing on the proposed findings that he "had never read the record of the trial" and that he "did not intend to" as he did not "have the time." *See* Order for Evidentiary Hr'g (S.D.Tex. Jan. 13, 1999) (unpublished) at 10 n.8. (quoting State Habeas Hr'g on Proposed Findings Tr. at 144-45). Consequently, according to the district court, "the [state habeas] judge denied Valdez's petition without seeing evidence which might have been favorable to Valdez, which the judge did not rule must be excluded, and which the judge even indicated had to be reviewed." *Valdez v. Johnson,* 93 F.Supp.2d 769, 782 (S.D.Tex.1999).

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resolved in his favor would grant him relief, and he has been denied a full and fair hearing in the state proceedings, a federal evidentiary hearing is mandatory. *See* 372 U.S. at 312-13, 83 S.Ct. at 757, *overruled in part by Keeney v. Tamayo-Reyes,* 504 U.S. 1, 5-6, 112 S.Ct. 1715, 1717-18, 118 L.Ed.2d 318 (1992) (holding that where the petitioner has failed to develop a claim in state court proceedings, he must establish cause and prejudice in order to receive a federal evidentiary hearing).

The court found that the "exclusion" of exhibits also resulted in a failure to develop the state factual record, which Valdez had not caused. Hence, the district court concluded that 28 U.S.C. § 2254(e)(2)[5] did not bar an evidentiary hearing.[6] Moreover, as discussed above, *Townsend* required an evidentiary hearing. Alternatively, the district court found it had the discretion to order an

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[5] 28 U.S.C. § 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
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> (A) the claim relies on –
>
> (I) a new rule of constitutional law, made retroactively applicable to cases on collateral review by the Supreme Court, that was previously unavailable, or
>
> (ii) a factual predicate that could not have been discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

[6] The district court reached its decision prior to the Supreme Court's decision in *Michael Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) in which the Supreme Court confirmed that § 2254(e)(2) did not bar evidentiary hearings when the failure to develop the record did not result from the prisoner's neglect or lack of due diligence.

The Supreme Court handed down two decisions that we cite in this opinion in which the petitioner has the last name "Williams." We distinguish between those two decisions by including the petitioners' first names in our citation of these cases.

evidentiary hearing under Rule 8 of the Rules Governing § 2254 Cases.[7]

After the evidentiary hearing,[8] the district court granted habeas relief concluding that Valdez's attorneys were ineffective in their preparation for and presentation at sentencing. In reaching this conclusion, the district court reviewed Valdez's ineffective assistance of counsel claim de novo. The district court found that the deferential framework set forth at § 2254(d) and 2254(e)(1) "largely d[id] not apply" because it had held an evidentiary hearing to remedy the state's denial of a full and fair hearing. *Valdez,* 93 F.Supp.2d at 777 (S.D.Tex.1999). Therefore, it applied the presumption of correctness only to the state habeas court's specific findings of historical fact, namely: (1) "it is common in the Corpus Christi, Nueces County Texas area for Hispanic males to drop out of school"; (2) "[t]he fact that the applicant had dropped out of school did not put Carl Lewis on notice of any potential mental problem, if any"; and (3) "Carl Lewis's failure to request the entire court jacket regarding the applicant's burglary charge in Hockley County did not fall below the professional

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[7] Rule 8(a) of the Rules Governing § 2254 Cases provides:

> If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

[8] The federal evidentiary hearing was, in many respects, a reprise of the state hearing. With the exception of Dr. George Parker, a psychologist called by the State, and trial counsel David Gutierrez, all of the witnesses that testified had testified in the state habeas hearing.

standard of conduct for defense attorneys." *See id.* at 778 n. 20 (quoting *Ex parte Valdez,* No. 87-CR-1459-B at 7 (117th Dist. Ct., Nueces County, Tex., March 31, 1997)). The district court then applied a preponderance of the evidence standard to the remainder of the evidence presented at the evidentiary hearing and assessed Valdez's ineffective assistance claim, a question of mixed law and fact, de novo.

The Director appeals the district court's grant of habeas relief on the grounds that (1) the district court erred in finding that the state court denied Valdez a full and fair hearing; (2) even if Valdez was denied a full and fair hearing, such a hearing is not a prerequisite to the operation of the deference required under § 2254; (3) even under de novo review, Valdez received effective assistance of counsel; and (4) the district court exceeded its remedial powers by directing the State to resentence Valdez or to impose a sentence of less than death. Additionally, the Director appeals the district court's exclusion of evidence offered by the Director at the evidentiary hearing.

## II

In reviewing a grant of the writ of habeas corpus, we review the district court's findings of fact for clear error. We review de novo the district court's disposition of pure issues of law and mixed issues of law and fact. *See Barrientes v. Johnson,* 221 F.3d 741, 750 (5th Cir.2000); *Bledsue v. Johnson,* 188 F.3d 250, 254 (5th Cir.1999).

The Director disputes the district court's finding that the state habeas court denied him a full and fair hearing, challenging both the legal conclusion and the conclusion's factual underpinning. We need not address that dispute

because we find that even if the state habeas court denied Valdez such a hearing, a full and fair hearing is not a prerequisite to the operation of AEDPA's deferential scheme.[9]

AEDPA limits the power of federal courts to grant writs of habeas corpus to those instances in which the state court's adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). Under AEDPA, clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Terry Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000). We review questions of law and mixed questions of law and fact under the "contrary to" and "unreasonable application" prong of 28 U.S.C. § 2254(d). *See Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.2000); *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir.1997).

Section 2254(d)'s deference operates when the state court has adjudicated the petitioner's claim on the merits. *See* 28 U.S.C. § 2254(d). An "adjudication on the merits" occurs when the state court resolves the case on substantive

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[9] Valdez filed his federal habeas petition on January 30, 1998, well after the effective date of AEDPA. *See* Pub.L. 104-132, 110 Stat. 1214 (1996). Accordingly, apart from the contention that a full and fair hearing bars the application of the AEDPA's standards, there is no dispute that AEDPA applies to Valdez's application.

grounds, rather than procedural grounds. *See Mercadel v. Cain,* 179 F.3d 271, 273 (5th Cir.1999) (holding that whether an adjudication on the merits has occurred is whether the state court disposed of the case on substantive or procedural grounds); *Fisher v. Texas,* 169 F.3d 295, 300 (5th Cir.1999) (finding that where a state habeas court decided the habeas applicant's claim on procedural grounds, there had not been an "adjudication on the merits").

In *Terry Williams,* 529 U.S. at 408, 120 S.Ct. at 1521, the Supreme Court found that a state court's adjudication falls under the "unreasonable application" prong when it "unreasonably applies the law of th[e Supreme] Court to the facts of a prisoner's case." The Court held that the test for whether a state court has unreasonably applied clearly established federal law is an objective one, which it framed as:

> Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case.

*Id.* at 409-10, 120 S.Ct. at 1521-22. Thus, it is not enough that a single reasonable jurist may agree with the application.[10]

While the Court did not fully elucidate the meaning of unreasonable, it carefully distinguished an unreasonable application from an erroneous application of federal law. According to the Supreme Court, a state court's erroneous or incorrect application per se is insufficient to allow issuance of the writ. *Id.* at 410-11, 120 S.Ct. at 1522. The Court stated:

> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established law erroneously or incorrectly. Rather, that application must also be unreasonable. *Id.* at 411, 120 S.Ct. at 1522.

Thus, a state court application may be incorrect in our independent judgment and, yet, reasonable. *See Neal v. Puckett,* 239 F.3d 683, 687 (5th Cir.2001). In *Gardner v. Johnson,* 247 F.3d 551, 560 (5th Cir.2001), we explored the level of deference to be accorded a state court decision under this standard and found that "we must reverse when we conclude that the state court decision applies the

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[10] In *Drinkard v. Johnson,* 97 F.3d 751, 769 (5th Cir.1996), we found the state court's application of federal law to be reasonable under a subjective test. In *Terry Williams,* the Supreme Court rejected *Drinkard* 's subjective test. *See Terry Williams,* 529 U.S. at 410, 120 S.Ct. at 1522; *see also Moore v. Johnson,* 225 F.3d 495, 501 n. 1 (5th Cir.2000) (acknowledging the Supreme Court's rejection of the *Drinkard* standard).

correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'"

Finally, AEDPA requires us to presume state court findings of fact to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

A

The district court found that the AEDPA standards of review "largely did not apply" because it "held an evidentiary hearing in order to consider evidence improperly excluded from consideration by the state habeas court." *See Valdez,* 93 F.Supp.2d at 777. The district court applied a presumption of correctness only to the specific findings of fact made by the state habeas court, namely: it is common for Hispanic males in the Corpus Christi, Nueces County, Texas area to drop out of school; the fact that Valdez "dropped out of school did not put [trial counsel] on notice of any potential mental problem"; and trial counsel's "failure to request the entire court jacket for the Hockley County charge did not fall below standard of conduct for defense attorneys." *Id.* at 778 n. 20. It declined to review the state habeas court's conclusions of mixed law and fact under § 2254(d)(1)'s unreasonable application prong. Additionally, it did not apply § 2254(e)(1)'s presumption of correctness to those findings of fact implicit in the habeas court's mixed law and fact conclusions.[11] Thus, the district

[11] The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact. *See, e.g., Marshall v. Lonberger,* 459 U.S. 422, 433, 103 S.Ct. 843, 850 74 L.Ed.2d 646 (1983) (applying presumption of correctness to implicit finding against the defendant's credibility, where that finding was

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court selectively applied the presumption of correctness, and did not apply § 2254(d)'s standards.[12]

The Director asserts that while the district court had the discretion to hold an evidentiary hearing, the district court's finding of the denial of a full and fair hearing and holding of a plenary hearing does not permit the district court to avoid the application of deference to the state court's adjudication on the merits.[13] In response, Valdez contends that a determination that a petitioner has received a full and fair hearing before the state court is a

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necessarily part of the court's rejection of the defendant's claim); *LaVallee v. Delle Rose,* 410 U.S. 690, 695, 93 S.Ct. 1203, 1206, 35 L.Ed.2d 637 (1973) (same); *see also Goodwin v. Johnson,* 132 F.3d 162, 183-84 (5th Cir.1998) (findings of fact can be implied from explicit conclusions of law).

[12] The district court in its decision appears to have treated both the habeas court's findings of historical fact and its conclusions of mixed law and fact as falling under (e)(1)'s presumption of correctness. Despite this appearance, we assume that this is not what the district court meant, as the presumption of correctness applies only to findings of historical fact. *See* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct"). Instead, a state habeas court's conclusions of law and mixed law and fact are examined under § 2254(d)(1). *See Clark v. Johnson,* 202 F.3d 760, 764 (5th Cir.2000).

[13] In her opening brief, the Director asserted that § 2254 barred the district court from holding an evidentiary hearing. Subsequent to the filing of that brief, the Supreme Court issued its decision in *Michael Williams,* 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (holding that § 2254(e)(2) operated only to bar a district court from granting an evidentiary hearing where a petitioner, through his own fault, failed to develop a claim before the state court and met neither of the exceptions). In light of this decision, the Director has abandoned this position in her reply brief. Instead, she pursues the argument that even with the discretion to grant an evidentiary hearing, the district court could not cast aside the deference to be accorded state court determinations of law and fact.

prerequisite to a finding that the state court reached an adjudication on the merits, and, thus, a prerequisite to the application of § 2254(d)'s deference as well as the presumption of correctness under § 2254(e)(1). We disagree with Valdez's contention and conclude that a full and fair hearing is not a prerequisite to the application of AEDPA's deferential framework.

Prior to the AEDPA amendments, § 2254(d) provided in relevant part:

> a determination ... made by a State court ... evidenced by a written finding ... or other reliable and written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –
>
> > (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; ...
> >
> > (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding.

28 U.S.C. § 2254(d) (1994) (repealed 1996). Once a petitioner established one of the situations set forth under § 2254(d)(1)-(7), such as the denial of a full and fair hearing, the presumption no longer operated[14]; instead, the

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[14] The dissent argues that former § 2254(d) did not apply altogether where the petitioner was denied a full and fair hearing in state court. *See* Dissenting Op. at 963 (arguing that under the "prevailing view," § 2254(d) did not apply where a full and fair hearing was denied, and a federal evidentiary hearing would have been required under *Townsend*). We disagree with this reading of § 2254(d). To begin, nothing in the statute suggested that its application was limited in this

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district court reviewed the claim de novo and reached its own independent factual determinations. *See* 28 U.S.C. § 2254(d) (1994) (repealed 1996) (providing where one of the situations in (d)(1)-(7) was not shown "the burden shall rest upon the applicant to establish by clear and convincing evidence that the factual determination by the State court was erroneous"); *Salazar v. Johnson,* 96 F.3d 789, 791 (5th Cir.1996) ("'[A] federal court is to accord a presumption of correctness to findings of state court proceedings unless particular statutory exceptions to § 2254(d) are implicated.'" (quoting *Williams v. Collins,* 16 F.3d 626, 631 (5th Cir.1994))). Thus, this pre-AEDPA presumption "merely erect[ed] a starting place or presumption, that [was to] be examined in light of the state court record." *Moore v. Johnson,* 194 F.3d 586, 603 (5th Cir.1999).

Apart from simply establishing a starting place, the pre-AEDPA presumption of correctness was of limited application and it was § 2254's only source of deference to state court adjudications. The presumption applied only to findings of fact. *See Crane v. Johnson,* 178 F.3d 309, 311 (5th Cir.1999); *Mason v. Balcom,* 531 F.2d 717, 722 (5th Cir.1976). It did not apply to mixed questions of law and fact nor did it apply to pure questions of law. *See Thompson v. Keohane,* 516 U.S. 99, 111-12, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (holding that questions with a "uniquely legal dimension" were outside § 2254(d)'s presumption of correctness). Under the now repealed version of § 2254, we reviewed such questions de novo, granting no deference to state court adjudications. *See, e.g., Muniz v.*

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way. Moreover, the dissent's reading of § 2254(d) would render superfluous § 2254(d)(2) and (6), which both required a full and fair hearing before the presumption of correctness would apply.

*Johnson,* 132 F.3d 214, 219 (5th Cir.1998) (reviewing questions of law de novo); *Lee,* 499 F.2d at 461 (finding that the district court "was under no constraint to defer to the state [court's] conclusions" as to mixed questions of law and fact).

In 1996, Congress enacted AEDPA, Pub.L. No. 104-132, 110 Stat. 1214 (1996), amending § 2254. These amendments jettisoned all references to a "full and fair hearing" from the presumption of correctness accorded state court findings of fact, along with the other situations which previously swept aside the presumption. The presumption of correctness erected in its place at § 2254(e)(1), now simply provides that unless the petitioner can rebut the findings of fact through clear and convincing evidence, those findings of fact are presumed to be correct.[15] To reintroduce a full and fair hearing requirement that would displace the application of § 2254(e)(1)'s presumption would have the untenable result of rendering the amendments enacted by Congress a nullity. *See, e.g., Am. Nat'l Red Cross v. S.G.,* 505 U.S. 247, 263, 112 S.Ct. 2465, 2475, 120 L.Ed.2d 201 (1992) (a "change in statutory language is to be read, if possible, to have some effect").

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[15] Section 2254(e)(1) replaced the eight specific exceptions to the presumption of correctness with one standard:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court proceedings, a determination of a factual issue made by a state court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of corrections by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

Furthermore, as discussed above, AEDPA put into place a deferential scheme, under which we must defer to a state court adjudication on the merits. *See* 28 U.S.C. § 2254(d).[16] In the prefatory paragraph to (d)(1) and (d)(2), the statute provides that an application for a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings." The word "shall" is mandatory in meaning. *See, e.g., In re Armstrong,* 206 F.3d 465, 470 (5th Cir.2000); *City of Dallas, Tex. v. FCC,* 165 F.3d 341, 358 (5th Cir.1999). Thus, we lack discretion as to the operation of this section. *See Lopez v. Davis,* 531 U.S. 230, 240-41, 121 S.Ct. 714, 722, 148 L.Ed.2d 635 (2001); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians,* 466 U.S. 765, 772-77, 104 S.Ct. 2105, 2110-2113, 80 L.Ed.2d 753 (1984). The use of "any" makes clear that this section applies to all cases adjudicated on their merits in state court. The term "adjudication on the merits," like its predecessor "resolution on the merits," refers solely to whether the state court reached a conclusion as to the

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[16] 28 U.S.C. § 2254(d) provides in full:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

substantive matter of a claim, as opposed to disposing of the matter for procedural reasons. *See Neal v. Puckett,* 239 F.3d 683, 686-87 (5th Cir.2001); *Mercadel,* 179 F.3d at 274 (5th Cir.1999). It does not speak to the quality of the process. *See Green v. Johnson,* 116 F.3d 1115, 1121 (5th Cir.1997) (rejecting pre-AEDPA contention that "the resolution on the merits prerequisite is a proxy for the quality of the legal process resolving a dispute"); *Murphy v. Johnson,* 205 F.3d 809, 813 (5th Cir.2000) (applying *Green* to "adjudication on the merits"). This mandatory and all-encompassing language combined with the meaning of "adjudication on the merits" leaves no room for judicial imposition of a full and fair hearing prerequisite.

Moreover, casting aside AEDPA's standards of review in the fashion urged by Valdez has another untenable result. Valdez asks us to inject a full and fair hearing as a prerequisite to the new deferential scheme applied to conclusions of law and mixed law and fact, which Congress put in place of our de novo review. In asking us to read the statute in this manner, Valdez would have us ignore the fact that Congress has excised this prerequisite from § 2254's presumption of correctness, and apply it to a deferential scheme which did not exist prior to AEDPA. The plain meaning of the text simply will not bear such a reading. Therefore, we hold that a full and fair hearing is not a precondition to according § 2254(e)(1)'s presumption

of correctness to state habeas court findings of fact nor to applying § 2254(d)'s standards of review.[17]

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[17] The dissent would have us depart from the plain language of the statute out of concern that the new AEDPA framework may abandon some of the procedural safeguards required by the former § 2254(d). *See* Dissenting Op. at 965. We cannot, however, second guess the intent of Congress in this manner. Moreover, AEDPA continues to provide protection in cases where the state court's process is in question. For example, as noted below, where a district court elects to hold an evidentiary hearing in light of a state habeas court's failure to allow an applicant to develop the factual basis of his claim, the hearing may assist the district court in ascertaining whether the state court reached a reasonable determination under § 2254(d)(1) & (2).

The dissent also contends that too literal of a reading of AEDPA's provisions is inconsistent with our prior case law interpreting § 2254(e)(2). Specifically, the dissent reads our construction of AEDPA's provisions to necessitate a finding that § 2254(e)(2) alone governs a district court's discretion in deciding whether to conduct an evidentiary hearing. The dissent argues that this is contrary to Fifth Circuit precedent, which has found pre-AEDPA case law instructive when reviewing a district court's refusal of a federal evidentiary hearing. *See* Dissenting Op. at 966. Our construction of AEDPA's provisions here, however, is not inconsistent with those cases. The cases cited by the dissent involved situations where § 2254(e)(2) did not apply because a prerequisite to that provision was not satisfied. In such cases, the district court's discretion to hold a hearing was not limited by § 2254(e)(2). *See* § 2254(e)(2) ("*If* the applicant has failed to develop the factual basis of a claim in State court proceedings. . . . " (emphasis added)); *Michael Williams*, 529 U.S. at 437, 120 S.Ct. 1479 (construing conditional language to mean that § 2254(e)(2) does not prohibit a federal evidentiary hearing where the failure to develop the factual basis was attributable to no fault of the petitioner); *Clark*, 202 F.3d at 765 ("[Section 2254(e)(2)] appl[ies] only where the failure to develop the factual basis is directly attributable to a decision or omission of the petitioner.").

Finally, the dissent suggests that a full and fair hearing prerequisite to AEDPA deference can be interpreted from the statute by reading § 2254(d)(2) and § 2254(e)(1) *in pari materia:* "[where a state habeas court denies a petitioner a full and fair hearing,] it seems disingenuous to conclude that the state court rendered a decision that was based on a

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In response, Valdez attempts to undercut this statutory interpretation with three contentions. First, Valdez contends that this reading of the statute renders an evidentiary hearing in cases like his a useless exercise. Second, Valdez asserts that this holding overrules our Circuit's precedent. Third, he urges us to adopt the approach taken by the Tenth Circuit.

First, Valdez asserts that our view of the statute renders impotent an evidentiary hearing held where the petitioner received an adjudication on the merits after a state hearing that was less than full and fair. We disagree. Where a district court elects, in instances not barred by § 2254(e)(2), to hold an evidentiary hearing, the hearing may assist the district court in ascertaining whether the state court reached an unreasonable determination under either § 2254(d)(1) or (d)(2). An evidentiary hearing is not

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reasonable 'determination of the facts in light of the *evidence presented,*' and is therefore entitled deference." Dissenting Op. at 967-68. We disagree with the dissent's argument on this point for two reasons. First, Congress's omission of language of a full and fair hearing is clear. Second, there is an easier way to harmonize § 2254(d)(2) and § 2254(e)(1). Whereas § 2254(d)(2) sets out a general standard by which the district court evaluates a state court's specific findings of fact, § 2254(e)(1) states what an applicant will have to show for the district court to reject a state court's determination of factual issues. For example, a district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. *See* § 2254(e)(1). It is then a separate question whether the state court's *determination* of facts was unreasonable in light of the evidence presented in the state court proceeding. *See* § 2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).

an exercise in futility just because §§ 2254(d) and (e)(1) require deference.

Second, Valdez maintains that we have elsewhere held that a full and fair hearing is a prerequisite to a determination that a state court has adjudicated a habeas applicant's petition on the merits. In support of this contention, Valdez directs us to *Morris v. Cain,* 186 F.3d 581 (5th Cir.2000); *Singleton v. Johnson,* 178 F.3d 381 (5th Cir.1999); and *Hughes v. Johnson,* 191 F.3d 607 (5th Cir.1999). Valdez is correct that we stated in *Morris* that a full and fair adjudication of a petitioner's claims in state court is a prerequisite for the application of AEDPA's standards of review. *See* 186 F.3d at 584. Additionally, we used similar language in *Corwin v. Johnson,* 150 F.3d 467, 471 (5th Cir.1998) ("In this Circuit, provided the state court conducted a full and fair adjudication of the petitioner's claims, pure questions of law and mixed questions of law and fact are reviewed under § 2254(d)(1).").

To the extent that these references to a "full and fair" adjudication refer to a full and fair state court hearing, they were dicta. Neither in *Morris* nor in *Corwin* were we confronted with a claim that the petitioner had been denied a full and fair hearing. *See Morris,* 186 F.3d at 584 ("In this appeal, [the petitioner] argues that the state court's unreasonable instruction led to his conviction under a standard contrary to settled federal law"); *Corwin,* 150 F.3d at 472 ("Corwin argues that . . . all state court determinations of federal constitutional issues in habeas proceedings should be subject to de novo review by the federal courts"). In *Nobles v. Johnson,* 127 F.3d 409 (5th Cir.1997), on which *Morris* relies for the "full and fair adjudication" proposition, we evinced concern that the state court had not adequately adjudicated the petitioner's

claim. While we stated our concern, we resolved the petitioner's claim on other grounds and did not delve further into the possible import of the way in which the state habeas court adjudicated the petitioner's claim.[18]

Apart from being dicta, these references also appear to conflate the adjudication on the merits requirement with a full and fair hearing requirement, referring to the adjudication on the merits as a "full and fair adjudication on the merits." *Morris,* 186 F.3d at 584; *Corwin,* 150 F.3d at 472. Where we have conducted an examination of whether an "adjudication on the merits" occurred, we have looked at whether the state court reached the merits of the petitioner's claim rather than deciding it on procedural grounds. *See Murphy,* 205 F.3d at 813 (finding that there was an adjudication on the merits because the state court reached the merits of the petitioner's claim); *Fisher,* 169 F.3d at 300 (concluding a state court's denial of relief on waiver grounds constituted a procedural, rather than a substantive, resolution of the case, and as such was not an adjudication on the merits). In short, we find that *Morris* and *Corwin* give us no guidance as to whether a full and fair hearing is a precondition to the operation of the AEDPA standards of review.

Furthermore, Valdez's reliance on *Hughes* is misplaced. In *Hughes,* we did not address the applicability of the AEDPA standards where a full and fair hearing had

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[18] The dissent also notes that a recent Supreme Court opinion similarly used language of a "full and fair adjudication." *Michael Williams,* 529 U.S. at 437, 120 S.Ct. 1479. *Michael Williams,* however, like *Morris* and *Corwin,* is inapposite in this case. In *Michael Williams,* the Court addressed the applicability of the § 2254(e)(2) bar to an evidentiary hearing, and not the applicability of AEDPA deference.

been denied. Instead, we addressed solely the question of whether *Hughes* was entitled to an evidentiary hearing. *See* 191 F.3d at 630. Thus, *Hughes* offers Valdez no support.

Valdez's reliance on *Singleton* is likewise misplaced. In *Singleton,* the trial court granted the petitioner habeas relief in part and, in so doing, issued findings of fact. The Texas Court of Criminal Appeals reversed and denied Singleton relief without issuing an opinion. *See* 178 F.3d at 384. Concluding that there were no findings of fact to which the presumption of correctness could attach, we remanded the case to the district court for a de novo evidentiary hearing. *See id.* at 385. While we found that Singleton was entitled to a "full and fair evidentiary hearing," we did not pass upon the question as to whether the absence of such a hearing precluded the operation of § 2254(d). *Id.* More importantly, we rejected Singleton's assertion that in the absence of any factual findings, the Texas Court of Criminal Appeals had not reached an adjudication on the merits, rendering § 2254(d) inoperative. *See id.* at 384. In doing so, we implied that § 2254(d) applied to such a summary disposition, even where the petitioner was entitled to an evidentiary hearing. Therefore, as with *Morris* and *Hughes,* we find that *Singleton* offers Valdez no support.

Third, Valdez urges us to adopt the approach of the Tenth Circuit. In *Miller v. Champion,* 161 F.3d 1249 (10th Cir.1998), the state habeas court denied the petitioner relief on the merits of his claim without an evidentiary hearing. *See id.* at 1253. Our sister circuit found that in the absence of a state hearing the petitioner was entitled to a federal evidentiary hearing. *See id.* More importantly, the Tenth Circuit concluded that the district court should

not afford AEDPA's deference to the state court's mixed law and fact conclusions. *See id.* at 1254. For this conclusion, the court rested solely on *Nguyen v. Reynolds,* 131 F.3d 1340, 1359 (10th Cir.1997). *See Miller,* 161 F.3d at 1253. The *Nguyen* court, however, did not apply AEDPA to the petitioner's claims because he had filed before the Act's effective date, rendering AEDPA's standards inapplicable. *See Nguyen,* 131 F.3d at 1345. Thus, in reaching its conclusion, the Tenth Circuit did not ground its decision on a reading of the statute, but in reliance on a case applying pre-AEDPA § 2254. Because of the rather tenuous footing of the Tenth Circuit's decision, we decline to adopt its approach.

Instead, our interpretation is in step with the Fourth Circuit's view of AEDPA deference. In an en banc decision, the Fourth Circuit recently rejected its prior decision in *Cardwell v. Greene,* 152 F.3d 331 (1998), which had adopted an approach akin to *Miller. See Bell v. Jarvis,* 236 F.3d 149, 158-160 (2000). In *Cardwell,* like *Miller,* the state court summarily denied the petitioner's request for relief without an evidentiary hearing. *See Cardwell,* 152 F.3d at 335. The Fourth Circuit found that the failure to develop the claim occurred through no fault of the petitioner, and, thus, § 2254(e)(2) did not bar an evidentiary hearing. *See id.* at 337. While the summary disposition qualified as an adjudication on the merits, see *id.* at 339, the court concluded that the absence of an articulated rationale rendered the difference "between de novo review and 'reasonableness' review [] insignificant." *Id.* at 339, (quoting *Cardwell v. Netherland,* 971 F.Supp. 997, 1015 (E.D.Va.1997)). The Fourth Circuit rejected *Cardwell*'s treatment of AEDPA's standards of review "to the extent that *Cardwell* requires federal habeas courts to conduct a

de novo or effectively de novo review of a summary state court decision, or to grant habeas relief based upon an independent determination that the state court has violated the constitutional rights of the petitioner." *Bell,* 236 F.3d at 160. In reaching this conclusion, the Fourth Circuit relied on the Supreme Court's recent elucidation of the AEDPA standards in *Terry Williams*. The court concluded that, in *Terry Williams*, "the Supreme Court has made it clear that de novo, independent, or plenary review of state court adjudications is no longer appropriate, that there are indeed important distinctions between the 'reasonableness' review called for by the AEDPA and the de novo review." *Bell,* 236 F.3d at 160.[19]

Admittedly, the focus of the *Bell* court was the summary nature of the state court's disposition, not that the state court denied Bell an evidentiary hearing. Nevertheless, the absence of a hearing is precisely a situation under our pre-AEDPA law where we would have found that the

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[19] The dissent questions our present reliance on *Bell* on the ground that it's reasoning is contrary to the direction given by the Supreme Court in three recent cases to courts applying AEDPA. Specifically, the dissent states that the *Bell* court departed from the requirement stated in *Weeks v. Angelone,* 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000), *Terry Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), and *Ramdass v. Angelone,* 530 U.S. 156, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000), that federal courts "adjudicate habeas corpus claims by first performing the court's traditional function of analyzing the merits of the federal constitutional claim and only then assessing whether § 2254(d)(1)'s new defense to relief precludes the granting of the writ in a case in which a court has found a constitutional violation." Dissenting Opinion at 971. Because we do not read the above Supreme Court cases to require the two-step inquiry suggested by the dissent, we continue to find the reasoning in *Bell* instructive.

state court denied the petitioner a full and fair hearing, potentially making a federal evidentiary hearing mandatory. *See, e.g., Austin v. McKaskle,* 724 F.2d 1153, 1156 (5th Cir.1984) (finding the denial of a full and fair hearing where no state evidentiary hearing was held). Likewise, the Fourth Circuit, pre-AEDPA would have found this to be the denial of a full and fair hearing. *See, e.g., Bacon v. Lee,* 225 F.3d 470, 489-90 (4th Cir.2000) (applying pre-AEDPA law and finding that in the absence of hearing, the petitioner had not received a full and fair hearing). In spite of what pre-AEDPA would have been the denial of a full and fair hearing, the Fourth Circuit found that the AEDPA standards applied, implying that there is no full and fair hearing requirement under AEDPA. Moreover, the Fourth Circuit's reasoning is sweeping, finding that AEDPA standards of review apply whenever there has been an adjudication on the merits.

In sum, we conclude the district court erred in determining that, where there had been a denial of a full and fair hearing, AEDPA's deferential framework, as set out in § 2254(d) and (e), did not apply to a state court's adjudication on the merits.

B

Valdez contends the AEDPA standards of review still should not apply because the state did not produce the missing exhibits in accordance with § 2254(f).[20] In making

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[20] 28 U.S.C. § 2254(f) provides:

If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the

(Continued on following page)

this argument, Valdez does not assert that the absence of any particular exhibit rendered impossible the district court's review of the state habeas court's determination of a specific factual issue; instead, Valdez's contention is a blanket one that the AEDPA standards of review should not operate because the State could not produce the exhibits.[21] We find Valdez's § 2254(f) argument unavailing.

First, in reviewing a claim under this section, we look to whether this inability to produce the exhibits resulted from some "deleterious or improper conduct." *Baker v. Estelle,* 711 F.2d 44, 46 (5th Cir.1983) (rejecting petitioner's argument that his sufficiency of the evidence claim should be resolved in his favor because the state was unable to produce a trial transcript where there had been no "deleterious or improper conduct" by the state).[22] The

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applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the record, then the existing facts and circumstances what weight shall be given to the State court's factual determination.

[21] We note that it is not clear that § 2254(f) impacts the § 2254(d) standards of review. On its face, the section appears to apply only to the presumption of correctness to be accorded state court factual findings. We decline to determine § 2254(f)'s applicability to these standards because it is unnecessary to our assessment of Valdez's § 2554(f) argument.

[22] Although *Baker* is pre-AEDPA, the AEDPA amendments made no alteration to this section. Instead, AEDPA merely redesignated the section from § 2254(e) to § 2254(f), its present location in the code. *See*

(Continued on following page)

absence or loss of the pertinent portions of the record alone is insufficient to support a finding of a deleterious or improper conduct. *See id.* Valdez has not alleged that the state court's loss of the exhibits during the six year period between the evidentiary hearing and the close of that hearing upon the motion of the parties occurred because of the state court's misconduct. Nor does the record disclose any such misconduct. In discussing the misplacement of the exhibits, this exchange occurred:

> THE COURT: Okay. I have gone through the four files and I did not find the exhibits. If I can't find them, you have copies.
>
> MR. LEVINGER: We can resubmit.
>
> THE COURT: I am going to have somebody look into, see if we have the actual exhibits. There was another court reporter that I had. I don't know if she placed them somewhere else, but if I don't find them, I am going to ask you to submit copies, if you will.

State Habeas Hr'g on Proposed Findings at 148-49. Given the six-year delay between the evidentiary hearing and the hearing on proposed findings in this case, and the absence of any assertion of misconduct, we cannot say that the failure to locate the exhibits was an "egregious breach of [the court's] duty." *Walker v. Maggio,* 738 F.2d 714, 717 (finding that the state's inability to locate the transcript after eight years was not "an egregious breach of duty" and applying the presumption of correctness).

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AEDPA, Pub.L. 104-132 § 104(2). Thus, our pre-AEDPA cases concerning this section remain applicable.

Second, where there is another means of adducing the requisite information for the purposes of the district court's review, the standards remain applicable. *See id.* at 716 (holding that the presumption of correctness still applied where the state court had held an evidentiary hearing as a means of reproducing the evidence and record produced from this hearing allowed the habeas court to review the claim); *Pruitt v. Hutto,* 574 F.2d 956, 957 (8th Cir.1978) (holding that while the state record was ordinarily indispensable to federal review, the state was not required to do the impossible and produce the transcript, where the district court had adequate information before it to assess the petitioner's claim); *see also Rideau v. Whitley,* 237 F.3d 472, 482-83 (5th Cir.2000) (finding that the state could not establish prejudice warranting dismissal of habeas claim where exhibits were lost because oral testimony in the state hearing adequately described the exhibits for the purposes of federal review). Our inquiry, therefore, focuses on whether the federal district court had the necessary materials with which to review the state court proceedings.

The district court had before it the following exhibits: (1) the Corpus Christi School records; (2) the affidavit of Dr. Cohorn and the Big Spring Hospital Psychiatric Evaluation; (3) the Hockley County conviction packet and underlying pleadings; (4) the Big Spring Hospital Psychiatric Evaluation proved up by the records keeper; (5) Lewis's fee application; (6) Gutierrez's fee application; (7) Dr. Price's curriculum vitae; (8) the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, February 1989. Thus, the

district court had before it what were exhibits 1-4, 6-7, and 13-14 in the state habeas proceeding.[23] These exhibits form the basis for Valdez's central contention – that he is mildly mentally retarded and that had his counsel performed some investigation they would have learned about his

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[23] The exhibits entered into evidence during the course of the state habeas hearing are as follows: (1) certified copies of the school records, see State Habeas Tr. 1:16; (2) certified copies of pleadings from the prior conviction at Hockley County, see State Habeas Tr. 1:16; (3) verified copies of a psychiatric and psychological evaluation performed on Valdez in 1974 at age 18, see State Habeas Tr: 1:16; (4) same documents as exhibit 3 but proven up by the psychologist who performed the test, whereas exhibit 3 was proven up by the records custodian, see State Habeas Tr. 1:16; (5) records of the Nueces County jail from Valdez's stay, including his request slips to use the library, see State Habeas Tr: 1:16 and State Habeas Tr. 2:392; (6) Carl Lewis's fee application, see State Habeas Tr. 1:56; (7) David Gutierrez's fee application, see State Habeas Tr. 1:63; (8) Letter from Alberto Valdez to Shirley Lopez, dated April 14, 1985, see State Habeas Tr 1:150-151, 152 (Valdez begins the letter "my dearest sweetheart" and wrote "I miss you and I love you" on the envelope); (9) Letter from Alberto Valdez to Shirley Lopez, see State Habeas Tr. 1:151, State Habeas Tr. 1:152 (wishing her a happy Mother's day and closing with "With love, hugs, and kisses for you sweetheart"); (10) Handkerchief made and sent by Valdez to Shirley and her daughter Monica, see State Habeas Tr. 1:151, 153-154; (11) 1985 Easter card to Monica Lopez, see State Habeas Tr. 1:164-65 (card says "Happy Easter, Sweetheart. I love you. Your Uncal [sic] Albert"); (12) handkerchief with panda bear on made by Valdez and sent to his niece Monica, see State Habeas Tr. 1:165-66 (he wrote on it "I love you Monica"); (13) American Bar Association Guidelines for the Appointment and Profession of Counsel in Capital Murder cases, see State Habeas Tr. 1:183; (14) curriculum vitae of Dr. Randall Price, see State Habeas Tr. 2:236; (15) Article from the Texas Poll Report summarizing the stories which were released from the 1988 Texas Poll, see State Habeas Tr. 2:342, 344 (discussing that, according to the poll, 73 percent of Texans surveyed were against the application of the death penalty to the mentally retarded); (16) State Habeas petition of Valdez, State Habeas Tr. 2:383; (17) photocopies of the psychiatric evaluation conducted at the Big Spring State Hospital and school evaluation; (18) penitentiary packs, see State Habeas Tr. 2:384.

limited intellect – placing before the district court those exhibits essential to its review of the state court's decision.

The exhibits that the federal district court lacked were: (1) the letters written and sent by Valdez to family members while he was incarcerated, exhibits 8, 9, and 11 at the state habeas hearing; (2) handkerchiefs with artwork added by Valdez and which he sent to his family members, while he was incarcerated, exhibits 10 and 12 at the state habeas hearing; (3) the records from the Nueces County Jail from Valdez's incarceration there during his trial, including his request slips to use the library, exhibit 5 at the state habeas hearing. *See supra* note 23. While the federal district court was without these exhibits, the state habeas record below contained sufficient descriptions of the remaining missing exhibits to inform the district court of their probative value. *See supra* note 23. Finding neither misconduct by the state court nor that the district court lacked the necessary evidence with which to reach a disposition of Valdez's claims, we conclude that the state's inability to produce the missing exhibits did not permit the district court to review Valdez's claims de novo.

C

Because we find that the district court erred in its failure to apply § 2254's deferential framework, we decline to address the merits of Valdez's claims for habeas relief. Instead, we vacate the district court's grant of the writ of habeas corpus and remand to the district court for assessment of Valdez's claims under standards set forth above. Furthermore, because we vacate the grant of the writ, we need not reach the Director's contentions regarding the proper scope of the writ.

## III

Finally, the Director contends that the district court abused its discretion by limiting the Director's introduction of evidence to that which the State presented in the state habeas proceeding. Specifically, the Director points to the exclusion of: (1) a 1972 report by Deborah Mayer detailing Valdez's "extensive and violent juvenile history"; (2) an affidavit by Dr. Cohorn; (3) intelligence test scores from Valdez's 1974 incarceration in the Texas Youth Commission; (4) results of a 1986 mental status examination by Dr. Otero; (5) evidence that Valdez passed an eighth grade equivalency test in 1986; and (6) a 1986 GED test report showing that Valdez passed four out of the test's five sections.

We review the district court's evidentiary rulings for abuse of discretion. *See United States v. Merida,* 765 F.2d 1205, 1215 (5th Cir.1985). "'A trial judge sitting without a jury is entitled to greater latitude in the admission or exclusion of evidence.'" *Gabriel v. City of Plano,* 202 F.3d 741, 745 (5th Cir.2000) (quoting *S. Pacific Trans. Co. v. Chabert,* 973 F.2d 441, 448 (5th Cir.1992)). An erroneous evidentiary ruling merits the reversal of judgment only "'where the challenged ruling affects a substantial right of a party.'" *Id.* (quoting *Johnson v. Ford Motor Co.,* 988 F.2d 573, 578 (5th Cir.1993)); *see Caparotta v. Entergy Corp.,* 168 F.3d 754, 755-56 (5th Cir.1999).

First, the district court excluded the report of Deborah Mayer, a probation counselor, because the Director did not show that it was available in 1988 or in 1990 at the state habeas hearing. Moreover, the district court found that the report contained hearsay. We find that the district court properly excluded the report as it was rife with hearsay.

*See* Fed.R.Evid. 802. Nor did the district court err in precluding the Director from using the report as a prior inconsistent statement as the report did not attribute the statements to any specific individuals. Additionally, contrary to the Director's contention that he was not allowed to question witnesses regarding the report, the district court allowed the Director to question witnesses regarding their awareness of the document. The district court merely precluded the Director from reading aloud hearsay statements contained within the report and asking if the statements surprised the witness.

Second, the district court excluded the affidavit of Dr. Cohorn because it contradicted the live testimony of Dr. Randall Price offered at the hearing. The district court concluded that an affidavit was an inappropriate vehicle for adducing controverted evidence, and exercised its discretion under 28 U.S.C. § 2246 to exclude the affidavit.[24] The district court also noted the availability of Dr. Cohorn as a live witness. The Director asserts that it sought to use this affidavit to clarify Dr. Cohorn's prior affidavit, which was introduced into evidence at both the state habeas hearing and the federal evidentiary hearing. The Director maintains that this prior affidavit resulted in the mistaken implication that Valdez was diagnosed as mildly retarded in competence testing by Dr. Cohorn.

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[24] 28 U.S.C. § 2246 provides:

> On application for a writ of habeas corpus, evidence may be taken orally or by depositions, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

On an application for a writ of habeas corpus, the district court has the discretion to receive evidence via affidavits. *See* 28 U.S.C. § 2246; *Loper v. Ellis,* 263 F.2d 211, 212 (5th Cir.1959). The introduction of affidavits into evidence is "subject to the right of the opponent to cross-examine the affiants by written interrogatories." *Loper,* 263 F.2d at 212. The Director attempted to introduce this new affidavit at the federal hearing without affording Valdez time to propound interrogatories in response. The Director did so when Dr. Cohorn was available to testify as a live witness. The district court instructed the Director that it would accept Dr. Cohorn's live testimony, but the Director declined to present him at the hearing. In light of Dr. Cohorn's availability and the lack of notice given to Valdez, the district court did not abuse its discretion in refusing to admit Dr. Cohorn's affidavit.

The district court found that the State's failure to produce or offer into evidence the remaining pieces of evidence noted above at trial or at the state habeas hearing established a presumption that the documents would not have been available at trial. The district court excluded these four exhibits as irrelevant because the Director failed to offer evidence to rebut that presumption. We find that the district court abused its discretion in doing so.

Evidence is relevant so long as it tends to "make the existence of any fact that is of consequence to the determination of an action more probable that [sic] it would be without the evidence." Fed.R.Evid. 401. The results of the Wechsler Adult Intelligence Scale test administered while Valdez was incarcerated with the Texas Youth Commission show that he had a verbal I.Q. of 76, a performance I.Q. of 90, and a full scale I.Q. of 81,

which are scores above the classification of mental retardation. During that same period of incarceration, Dr. Rafael Otero examined Valdez and concluded that Valdez was not mentally deficient. In 1986, Valdez passed an eighth grade equivalency test and four out of five sections of the GED. These results also tend to undercut Valdez's assertion that he is mentally retarded. Thus, these test results and the report by Dr. Otero tend to contravene Valdez's contention that he is mentally retarded, which bears on whether his trial counsel's performance prejudiced him.

Assuming *arguendo* that the relevance of these four records is contingent on establishing that they were available at trial, the presumption on which the district court based its ruling fails. The district court assumed that had the records been available to the State, the State would have presented the records at the state habeas hearing. Based on this assumption, the district court concluded that the records were not available at the time of trial, absent a showing to the contrary by the Director. While this inference is not illogical, it is nevertheless belied by the fact that these four documents existed prior to Valdez's trial and habeas hearing. The Director authenticated these records via offers of affidavits by the records custodians, which substantiates their dates of creation. Therefore, the district court abused its discretion in excluding the Texas Youth Commission Intelligence Test, Dr. Otero's report, the eighth grade equivalency exam, and Valdez's results on the GED. The exclusion of this evidence undermined the Director's ability to contest Valdez's contention that he was prejudiced by his counsel's performance. Thus, we find that the exclusion of these records affected the Director's substantial rights because we

cannot "be certain . . . that the error had a slight effect" on the disposition of the case. *Tanner v. Westbrook,* 174 F.3d 542, 549 (5th Cir.1999). On remand, the district court must admit these records and consider them in reaching its disposition of Valdez's claims.

## IV

In sum, we hold that a full and fair hearing is not a prerequisite to the application of 28 U.S.C. § 2254's deferential scheme. Therefore, we VACATE and REMAND to the district court for an assessment of Valdez's claims applying the standards set forth in § 2254(d) and (e)(1). With respect to the district court's evidentiary rulings, we AFFIRM in part and VACATE in part.

DENNIS, Circuit Judge, dissenting:

Director Cockrell asserts that the plenary hearing held by the district court in response to its finding that the state habeas court denied Valdez a full and fair hearing did not excuse the application of AEDPA "deference" to the state court's adjudication on the merits. Under this view, which the majority opinion embraces, the absence of a full and fair hearing in state court would entitle a petitioner to an evidentiary hearing before the federal district court, but the district court would nevertheless be required, pursuant to the AEDPA, to extend deference to the suspect determinations of the state court. In his brief, Valdez responds as follows:

> [I]t would make little sense to require a federal district court to conduct its own evidentiary hearing because of material deficiencies in the state court proceeding, yet at the same time require the district court to disregard the fully developed

> evidence presented in its own court and instead defer to the decision of the state court made on an incomplete record. . . .

The simple and compelling logic underlying this response finds ample support in Fifth Circuit and Supreme Court precedent, as well as in the writings of leading habeas corpus scholars. Therefore, I respectfully dissent.

## *I. The State Court Denied Valdez a Full and Fair Hearing*

Concluding that he had not received a full and fair hearing at the state habeas level, the federal district court granted Valdez an evidentiary hearing on his ineffective assistance of counsel claim. The district court based its conclusion on both (1) a finding that the state habeas court lost, and therefore did not consider, certain exhibits admitted into evidence during the hearing,[1] and (2) the state habeas court's failure to read the trial transcript. One need only examine the latter ground to determine that the state court did indeed deny Valdez a full and fair hearing.

In *Dobbs v. Zant,*[2] the Supreme Court emphasized the importance of "reviewing capital sentences on a complete record."[3] Accordingly, this court has recognized that meaningful federal habeas review requires a trial transcript,[4]

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[1] *See* Maj. Op. at 944.

[2] 506 U.S. 357, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993).

[3] *Id.* at 358, 113 S.Ct. 835.

[4] *See, e.g., Magouirk v. Phillips,* 144 F.3d 348, 363 (5th Cir.1998) ("We are at a loss to understand how a federal habeas court can conduct a meaningful sufficiency review without a transcript of [the] trial.").

and familiarity with the trial and sentencing proceedings is no less indispensable to the state habeas court in reaching its resolution on the merits. In the present case, the state habeas judge did not preside over Valdez's criminal trial. Consequently, he lacked the advantage of a personal recollection of the trial proceedings.[5] Nevertheless, at a hearing on Valdez's petition, the state habeas judge stated: "I have never read the record of the trial and I don't intend to. I don't have the time."[6] Although the Director contends that it was never shown that the judge did not read the record during the period between the hearing and the issuance of the order denying Valdez's habeas petition, the Director offers no evidence that he did. Thus, the district court was reasonable in its conclusion that the state habeas judge did not read the trial transcript.

The Director asserts that even if the state habeas court did not read the trial transcript, this failure did not deny Valdez a full and fair hearing because Valdez's counsel sufficiently informed the court of the trial proceedings by directing the court's attention to relevant portions of the record and quoting it at length in the habeas petition.

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[5] This court has heavily relied on this advantage when deciding whether "paper hearings" are full and fair. "Paper hearings are hearings where the state judge did not hear live testimony, but instead relied on affidavits." *Perillo v. Johnson*, 79 F.3d 441, 446 n. 7 (5th Cir.1996). *See, e.g., Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir.2000) (finding that paper hearing was full and fair where habeas judge had been the trial judge). *Cf. Perillo*, 79 F.3d at 446-47 (concluding that the state habeas judge's reliance on transcripts and affidavits to resolve ineffective assistance claim presented unacceptable "danger of 'trial by affidavit,'" especially given that the judge did not preside at trial and "could not supplement the affidavits with his own recollection of the trial and [defense counsel's] performance in it").

[6] *Valdez v. Johnson*, 93 F.Supp.2d 769, 776 (S.D.Tex.1999).

But discrete references to the record made at various stages of the state habeas proceeding do not provide a complete picture of what took place at trial. In *Flanagan v. Henderson,*[7] we found that a federal district court erred in denying habeas relief without holding an evidentiary hearing where there was no trial transcript to provide the "factual basis" necessary for the resolution of the petitioner's due process and ineffective assistance of counsel claims.[8] The state record contained only "pleadings, minute entries by the State district court clerk, various orders entered by the State trial judge and a series of abbreviated excerpts from the court reporter's notes which relate to the 108 Bills of Exception assigned during pre and post trial proceedings and during the trial itself."[9] Addressing the adequacy of this record, we stated:

> It well may be that the entire record transcript of the State trial is still available and that it alone will afford a fact finding procedure which is adequate to afford a full and fair hearing. However, no such transcript is now a part of the record in this cause and no fair appraisal of the reliability of the resolutions of those fact issues which have been developed by the petition can be made from the bits and pieces of the trial transcript which formed the record examined by the court below. Such a record is inadequate.[10]

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[7] 496 F.2d 1274 (5th Cir.1974).

[8] *Id.* at 1277 (citing *Townsend v. Sain,* 372 U.S. 293, 312-13, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) ("[A] federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.")).

[9] *Flanagan,* 496 F.2d at 1276.

[10] *Id.* at 1277.

If a record tailored from fragments of material generated by the state trial court is insufficient for us to decide an ineffective assistance of counsel claim, it is likewise inadequate for a state habeas court lacking first-hand knowledge of the trial proceedings. The conclusion is therefore inescapable that the state habeas judge's decision not to read the trial transcript denied Valdez a full and fair hearing.

## *II. A Full and Fair Hearing Is a Prerequisite to AEDPA "Deference"*

The district court found that the AEDPA standards of review "largely do not apply since this Court has held an evidentiary hearing in order to consider evidence improperly excluded from consideration by the state habeas court."[11] Thus, the district court addressed "the ultimate conclusion regarding ineffective assistance of counsel without the presumption that the state court's conclusion was correct."[12] In support of the court's finding, Valdez asserts that pre-AEDPA law governs the consequences that arise when a federal evidentiary hearing is mandatory because the state court failed to conduct a full and fair hearing. This case therefore requires an understanding of pre-AEDPA law.

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[11] *Valdez*, 93 F.Supp.2d at 777.

[12] *Id.* at 778.

A. *Pre-AEDPA Law*

In the 1953 case of *Brown v. Allen*,[13] the Supreme Court decided when a federal habeas corpus court is to hold its own hearing on a constitutional claim. Roughly speaking, the Court concluded that if there were "unusual circumstances" or a "vital flaw" in the state court process, a federal hearing was required.[14] But even in the absence of a defect, the district court remained free, in the exercise of its discretion, to take testimony as to the facts.[15]

Because the *Brown* opinion did not define "unusual circumstances" or "vital flaw," and because the lower federal courts were reaching inconsistent results, the Supreme Court sought to clarify matters in the 1963 case of *Townsend v. Sain*.[16] The Court unanimously held that whenever a habeas applicant alleges facts that, if proved, would entitle him to relief, the federal court may "receive evidence and try the facts anew."[17] The Court was likewise unanimous in stating that independent factfinding is *mandatory* "if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding."[18] A majority of the Court proceeded to list six circumstances in which a federal evidentiary hearing was mandatory. These were:

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[13] 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953).

[14] *See* 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4265 (2d ed. 1988 & Supp.2001).

[15] *Id.*

[16] 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

[17] *Id.* at 312, 83 S.Ct. 745.

[18] *Id.*

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[19]

The Court also repeated in *Townsend* that the district court has the discretion to conduct a hearing in any case, even when none of the above criteria is met.[20]

In 1966, Congress enacted the former 28 U.S.C. § 2254(d), which provided:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

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[19] *Id.* at 313, 83 S.Ct. 745.

[20] *See id.* at 318, 83 S.Ct. 745.

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively

> set forth in paragraphs (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.[21]

The tests for procedural regularity and substantive accuracy established by former § 2254(d) bore an obvious resemblance to the *Townsend* guidelines. However, as observed by Professor Yackle:

> The precise fit between the former § 2254(d) and *Townsend* was never perfectly clear. The prevailing view was that the former § 2254(d) neither displaced nor codified *Townsend*'s holding on the threshold question of whether a court must conduct a hearing. Rather, the former § 2254(d) assumed that a federal hearing was to be held and addressed only the bearing previous state court findings should have in that federal proceeding. The key to that interpretation lay in the text of the former § 2254(d) itself, which provided that the presumption in favor of state findings would apply "in" a federal habeas proceeding and that the applicant could rebut that presumption "in an evidentiary hearing in the federal proceeding"

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[21] 28 U.S.C. § 2254(d) (1994) (repealed 1996).

> by adducing convincing evidence that the state finding was erroneous.[22]

Thus, under the "prevailing view," the statute did not come into play if a federal hearing was mandatory under

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[22] Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 139 (1996). *See Developments in the Law – Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1122 n.46 (1970):

> On its face and in light of the legislative history, the [1966] amendment is not directed at the question whether to hold a federal evidentiary hearing. Instead, it assumes that a hearing is to be held and attempts to decide if the state's factual conclusions are to be deemed presumptively correct at that hearing. Though their purposes are distinguishable, the amendment and *Townsend* do reinforce each other. If the procedure at the state hearing was so inadequate that a *Townsend* hearing is necessary, it would be inconsistent, as the statute recognizes, for the judge at the federal evidentiary hearing to treat the state decision as presumptively correct.

*See also LaVallee v. Delle Rose*, 410 U.S. 690, 701 n. 2, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973) (Marshall, J., dissenting) ("The Court, of course, does not hold that the District Court erred in holding a de novo evidentiary hearing on the voluntariness of respondent's confession. That is a question distinct from the presumption of validity and the special burden of proof established by 28 U.S.C. § 2254(d). Section 2254(d) says nothing concerning when a district judge may hold an evidentiary hearing – as opposed to acting simply on the state court record – in considering a state prisoner's petition for federal habeas corpus. So far as I understand, the question whether such a hearing is appropriate on federal habeas corpus continues to be controlled exclusively by our decision in *Townsend v. Sain* even after the enactment of § 2254(d)."); *Guice v. Fortenberry*, 661 F.2d 496, 501 (5th Cir.1981) ("*Townsend* was not, however, completely superseded by the [1966] amendment, for the Supreme Court decided when a federal evidentiary hearing is mandatory while the habeas corpus statute, as amended, merely establishes a presumption that the state court judgment is correct unless the applicant establishes one of a number of specific reasons to disregard it.").

*Townsend*.[23] The parties were simply left in their traditional positions; i.e., the petitioner had to establish a prima facie case for relief, thereby forcing the respondent to come forward with rebutting evidence.[24] However, if *Townsend* did not require an evidentiary hearing, but the federal habeas court granted one in its discretion, and the petitioner could not demonstrate by a preponderance of

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[23] *See Fowler v. Jago*, 683 F.2d 983, 988 (6th Cir.1982):

> Although on its face the statute does not govern when a federal court must hold an independent evidentiary hearing, it does require that state court findings of fact made after a full and fair hearing are entitled to a presumption of correctness. If the findings of the state court meet the indicia outlined in § 2254(a), the state court determination is presumed to be correct. Nevertheless, the presumption and special burden of proof do not operate at all if any one of the eight specified exceptions to the statute exists. These eight exceptions appear to subsume the six *Townsend* criteria. Thus, the determination that one of the six *Townsend* criteria exists necessarily resolves the § 2254(d) burden of proof issue. If one of the *Townsend* criteria is present, the district court must hold an evidentiary hearing and the presumption of correctness does not apply. Conversely, if the presumption is operative, an evidentiary hearing cannot be mandated.

*See also Collins v. Francis*, 728 F.2d 1322, 1344 n. 24 (11th Cir.1984):

> Petitioner cites 28 U.S.C. § 2254(d) (eliminating the presumption of correctness ordinarily accorded state habeas court findings when these findings arose out of a hearing that was not full and fair). This rule does not aid us. If we find, when we apply the [*Townsend v.*] *Sain* test, that the district court should have held an evidentiary hearing, we necessarily find, as well, that § 2254(d) applies to eliminate the presumption of correctness. If the *Sain* test does not mandate a hearing, the presumption of correctness necessarily stands. Our focus is on the *Sain* test, not on the § 2254(d) presumption of correctness determination.

[24] LARRY W. YACKLE POST CONVICTION REMEDIES § 134, at 509 (1981).

the evidence that the state court proceeding failed one of the eight statutory standards, then § 2254(d) provided that the state factual findings were presumed to be correct – unless the petitioner showed by "convincing" evidence that the state determinations were erroneous.[25]

The foregoing authorities clearly demonstrate that prior to the AEDPA, the denial of a full and fair hearing defeated the presumption of correctness.[26] The Supreme Court's decision in *Townsend* dictated this defeat because two of the six criteria listed by the Court hinged upon the full and fair hearing requirement. When the requirement was not met, the federal habeas court had to afford the petitioner an evidentiary hearing. At the federal hearing, the presumption of correctness did not apply. Although this point eludes the majority, the inapplicability of the

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[25] *Id.* at 508-09. *See Miller v. Fenton,* 474 U.S. 104, 111, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) ("When a hearing is not obligatory . . . the federal court 'ordinarily should . . . accept the facts as found' in the state proceeding.") (citation omitted); *Guice v. Fortenberry,* 661 F.2d 496, 501 n. 6 (5th Cir.1981) ("The statute lists eight possible deficiencies in state court fact-findings (rather than the Townsend six); but their relevance is to the question whether the state findings are to be 'presumed' correct. Further, if none of the eight deficiencies is shown, the effect of this is, not to negate the power of the judge to call for a hearing, but, confusingly, to shift to the petitioner the burden to show at a hearing that the state findings were erroneous.") (quoting PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1505 n. 7 (2d ed.1973)). *See also Developments in the Law, supra* note 22, at 1144 ("The [1966] amendment seems clearly designed to control the burden and standard of proof in those evidentiary hearings not mandated by *Townsend.*").

[26] *See Nethery v. Collins,* 993 F.2d 1154, 1157 (5th Cir.1993) ( "The state habeas court found as a matter of fact that the judge was not a personal friend of the victim. Because it did not follow on the heels of a full and fair hearing, this finding is not entitled to the statutory presumption of correctness.").

presumption was obvious, for "if *Townsend* indicates sufficient unreliability in the state conclusions so that a new hearing is required, it is reasonable to refuse to give weight to the former conclusions in the new hearing."[27]

B. *The AEDPA – The Effect of State Factual Findings*

The AEDPA repealed former § 2254(d) and replaced it with two new provisions dealing with state court factfindings and factfinding procedures, 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
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> . . .
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

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[27] *Developments in the Law, supra* note 22, at 1142.

Professor Yackle interprets the amendments in the following manner:

> Under the former § 2254(d), the presumption of accuracy owed to state findings was contingent on written evidence of the state court's conclusions, sound process in state court, and fair support in the evidentiary record. Indeed, the former § 2254(d) set out its list of procedural and substantive standards as the means by which the federal habeas courts could determine whether state findings were entitled to the presumption. Read literally, the new § 2254(e)(1) preserves the presumption in favor of state court findings, but eliminates both the former requirement that findings must be in writing and any federal standards for the fact-finding process and the evidentiary record in state court. Bluntly stated, it appears that the federal habeas courts must accept state court findings at face value – no questions asked.
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> A change of that kind would be dramatic and not something that anyone would lightly read into the new law. One can imagine that, in some circumstances at least, serious constitutional questions would be raised by a rule that requires a federal court to accept a factual finding made in state court, with no written statement of the finding on which to focus and with no ability to assess the process out of which that finding emerged and the evidence on which it was based.
>
> Moreover, § 2254(e)(1) must be reconciled with the new version of § 2254(d), which has it that a federal habeas court may award relief on the merits if a state court based its decision against a petitioner on "an unreasonable determination of the facts in light of the evidence."

Under that new provision, a federal court can scarcely be indifferent to the process by which a state court reached a factual finding or the evidentiary support that finding enjoys.

I read § 2254(e)(1) to drop the specific procedural and substantive standards contained in the former § 2254(d). But I do not read it to dispense with a federal court's rudimentary responsibility to ensure that it is deciding a constitutional claim based on factual findings that were forged in a procedurally adequate way and were anchored in a sufficient evidentiary record. In this sense, § 2254(e)(1) departs from prior law, but only to substitute general notions of procedural regularity and substantive accuracy for detailed statutory standards.[28]

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[28] Yackle, *supra* note 22, at 140-41. Liebman and Hertz assert that new sections 2254(d)(2) and 2254(e)(1) must be read *in pari materia*. "Doing so leads to the conclusion that section 2254(d)(2) divides 'determination[s] of the facts' into two categories – state court factfindings that are flawed because they are 'unreasonable,' hence are a basis for habeas corpus relief without more; and findings that are not flawed because they are '[ ]reasonable,' hence are presumed to be correct unless the petitioner proves otherwise 'by clear and convincing evidence.'" 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 20.2c, at 751 (3d ed. 1998 & Supp.2000). Thus, "the inquiry required by two . . . superseded subsections – into the 'full [ness], fair[ness], and adequa[cy]' of the state court's 'factfinding procedure,' superseded 28 U.S.C. §§ 2254(d)(2), 2254(d)(6) (1994) – is not appreciably different from the new Act's 'reasonableness' inquiry." *Id.* at 753 n. 78. *See Barnett v. Hargett*, 174 F.3d 1128, 1136 (10th Cir.1999) (presumption of correctness did not attach to state court's historical finding of fact that a pretrial competency hearing was held, because this historical finding was not made at a "full, fair, and adequate hearing"; "presumption of correctness [under 28 U.S.C. § 2254(e)(1)], even for the purely historical fact as to whether a [competency] hearing occurred, . . . does not apply when 'some reason to

(Continued on following page)

The majority points out that the AEDPA "jettisoned all references to a 'full and fair hearing.'"[29] So, in its view, "[t]o reintroduce a full and fair hearing requirement that would displace the application of § 2254(e)(1)'s presumption [of correctness] would have the untenable result of rendering the amendments enacted by Congress a nullity."[30] While the deletion of language by Congress is often controlling in the enterprise of statutory construction, AEDPA cannot reasonably be interpreted in such a manner. Consider the following observations from the late Professor Wright:

> The old statute [former 28 U.S.C. § 2254(d) (1994)] applied to "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia * * *." The new statute [28 U.S.C. § 2254(e)(1)] applies to "a determination of a factual issue made by a State court * * *." Thus, at least on its face the new statute does not require that the determination be "after a hearing on the merits" of the factual issue, it does not require that the applicant for the writ and the State or an officer or agent have been parties, and it does not require that the determination be evidenced by written indicia. Indeed the new statute does not even require that the state court that made

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doubt the adequacy or the accuracy of the fact-finding proceeding' exists").

[29] Maj. Op. at 949.

[30] *Id.* at 950.

> the determination have been a court of competent jurisdiction. Presumably the courts will continue to insist on that and it is likely that some of the other elements that were in the old statute but not in the new one will be read back into it by the courts.[31]

Thus, under the method of construction advanced in the majority opinion, this court could not require sound process, or even competent jurisdiction, in the state court that issued factual findings. Moreover, § 2254(e), unlike its predecessor, does not state that the petitioner's burden of rebutting the presumption of correctness arises "in" a federal evidentiary hearing.[32] Under the majority's construction, this omission means that § 2254(e) does not presuppose that a federal evidentiary hearing is to be held on the basis of *Townsend,* but rather that § 2254(e) speaks to whether a hearing will be conducted in the first instance. But the Fifth Circuit has rejected an interpretation along these lines. In *Clark v. Johnson,*[33] a habeas petitioner complained that the state habeas court did not afford him a full and fair hearing, and thus the federal district court erred in denying him discovery and an evidentiary hearing. After finding that the petition was governed by the AEDPA, the court stated that "[o]ur pre-AEDPA jurisprudence is instructive in evaluating whether the district court's denial of discovery and an evidentiary hearing was an abuse of discretion."[34] After surveying the jurisprudence, the court continued: "To find an abuse of

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[31] WRIGHT ET AL., *supra* note 14, § 4265.2 (Supp.2001).

[32] *See supra* text accompanying note 22.

[33] 202 F.3d 760 (5th Cir.2000).

[34] *Id.* at 766.

discretion which would entitle Clark to discovery and an evidentiary hearing to prove his contentions, we would necessarily have to find that the state did not provide him with a full and fair hearing . . . ."[35] The court ultimately concluded that the state proceedings did provide Clark with a full and fair hearing.[36] The court's analysis of Clark's claim is significant, however, because it indicates that a state court's denial of a full and fair hearing continues to mandate, post-AEDPA, a federal evidentiary hearing pursuant to *Townsend*. Even the majority acknowledges the continuing validity of the full and fair hearing requirement in this context.[37]

Despite this acknowledgment, the majority finds that *Singleton v. Johnson*[38] "offers Valdez no support."[39] There, the state habeas court granted the petitioner relief in part and issued findings of fact. The Texas Court of Criminal Appeals reversed and denied Singleton relief without issuing an opinion. Concluding that there were no findings to which the presumption of correctness could apply, we

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[35] *Id.*

[36] *Id.*

[37] In support of his argument that the denial of a full and fair state court hearing entitles a petitioner to a federal hearing and defeats the presumption of correctness, Valdez cited *Hughes v. Johnson*, 191 F.3d 607, 630 (5th Cir.1999) ("When there is a factual dispute, [that,] if resolved in the petitioner's favor, would entitle [him] to relief and the state has not afforded the petitioner a full and fair evidentiary hearing, a federal habeas corpus petitioner is entitled to discovery and an evidentiary hearing.") (citation omitted). The majority opinion states that "Valdez's reliance on *Hughes* is misplaced" because the court in that case "addressed solely the question of whether Hughes was entitled to an evidentiary hearing." Maj. Op. at 952.

[38] 178 F.3d 381 (5th Cir.1999).

[39] Maj. Op. at 952.

held that the petitioner was entitled to a "full and fair evidentiary hearing" on the factual issue in dispute.[40] The case was therefore remanded for a "*de novo* evidentiary hearing."[41] The majority states that we "did not pass upon the question as to whether the absence of . . . [a full and fair hearing] precluded the operation of § 2254(d)."[42] The majority then asserts that in determining that the Texas Court of Criminal Appeals reached an adjudication on the merits, this court "implied that § 2254(d) applied to such a summary disposition, even where the petitioner was entitled to an evidentiary hearing."[43] But *Singleton* does not permit this implication. A hearing *de novo* is a "new hearing of a matter, conducted as if the original hearing had not taken place."[44] Where such a hearing is ordered, there is no room for deference to the previous court's findings. Fifth Circuit precedent therefore suggests that the AEDPA did not disturb prior law concerning the circumstances in which a federal evidentiary hearing is mandatory. Because *Townsend* still governs that question, the denial of a full and fair hearing must render inoperative the statutory presumption of correctness, just as it did prior to the 1996 amendments.[45]

Another weakness in the majority opinion's treatment of the presumption of correctness is its failure to apply § 2254(d)(2). Although the courts have not made it clear

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[40] *Singleton*, 178 F.3d at 385.

[41] *Id.*

[42] Maj. Op. at 952.

[43] *Id.*

[44] BLACK'S LAW DICTIONARY 725 (7th ed.1999).

[45] *See supra* note 26. *See also Miller v. Champion*, 161 F.3d 1249 (10th Cir.1998).

how § 2254(d)(2)'s "invitation to decide whether the state fact determinations were reasonable . . . fit[s] with the presumption that the state fact determinations are correct,"[46] leading scholars contend that reading § 2254(d)(2) and § 2254(e)(1) *in pari materia* yields results similar to those reached when § 2254(d) explicitly provided that the denial of a full and fair hearing defeated the presumption of correctness.[47] In the present case, the state habeas judge did not read the trial transcript, thus depriving Valdez of a full and fair hearing. In light of this failure, it is disingenuous to conclude that the state court rendered a decision that was based on a reasonable "determination of the facts in light of the *evidence presented,*"[48] and is therefore entitled to deference. Instead, a faithful application of § 2254(d)(2) supports the approach taken by the federal district court.

In sum, there is a complete absence of support for the majority's holding that a federal court must apply the presumption of correctness when the state court's failure to provide a habeas petitioner with a full and fair hearing necessitates a federal evidentiary hearing. In his brief, Valdez argues that the "AEDPA simply does not address the issue of when a federal evidentiary hearing is required, or the consequence of conducting such a hearing, when the state courts have failed to provide a full and fair hearing." Scholarly commentary on the AEDPA and this court's post-AEDPA jurisprudence overwhelmingly support this argument.

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[46] WRIGHT et al., *supra* note 14, § 4265.2 (Supp.2001).

[47] *See supra* note 28 and accompanying text.

[48] 28 U.S.C. § 2254(d)(2) (emphasis added).

C. *The AEDPA-Conclusions of Law and Mixed Questions of Law and Fact*

28 U.S.C. § 2254(d)(1) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
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> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

Subsection (d)(1) governs review of questions of law and mixed questions of law and fact when the state court has adjudicated the petitioner's claim on the merits. An "adjudication on the merits" occurs when the state court resolves the case on substantive grounds, rather than procedural grounds.[49] The majority asserts that the mandatory language of § 2254(d)(1) "combined with the meaning of 'adjudication on the merits' leaves no room for judicial imposition of a full and fair hearing prerequisite."[50] However, in *Morris v. Cain,*[51] this court stated: "A full and fair adjudication of a petitioner's claims in state court is a prerequisite for application of AEDPA's review provisions."[52] Moreover, in *Corwin v. Johnson,*[53] we declared:

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[49] *See Mercadel v. Cain,* 179 F.3d 271, 273 (5th Cir.1999).

[50] Maj. Op. at 950.

[51] 186 F.3d 581 (5th Cir.1999).

[52] *Id.* at 584.

[53] 150 F.3d 467 (5th Cir.1998).

"In this Circuit, provided the state court conducted a full and fair adjudication of the petitioner's claims, pure questions of law and mixed questions of law and fact are reviewed under § 2254(d)(1)."[54]

Addressing this clear precedent, the majority opinion states that "[t]o the extent that these references to a 'full and fair' adjudication refer to a full and fair state court hearing, they were dicta. Neither in *Morris* nor in *Corwin* were we confronted with a claim that the petitioner had been denied a full and fair hearing."[55] The majority further asserts that "[a]part from being dicta, these references also appear to conflate the adjudication on the merits requirement with a full and fair hearing requirement, referring to the adjudication on the merits as a 'full and fair adjudication on the merits.'"[56] This assertion is questionable, however, in light of the discrete meaning of "adjudication on the merits" and the statement made earlier in the majority opinion that the phrase "does not speak to the quality of the process."[57] The better view is that the "full and fair hearing" and "adjudication on the merits" requirements retain independent significance.[58] This view is supported by the Supreme Court's unanimous

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[54] *Id.* at 471.

[55] Maj. Op. at 951.

[56] *Id.* at 906.

[57] *Id.* at 950.

[58] Indeed, in *Singleton v. Johnson*, 178 F.3d 381, 384-85 (5th Cir.1999), this court concluded that the Texas Court of Criminal Appeals' denial of relief constituted an adjudication on the merits, but nevertheless remanded the case for a "full and fair evidentiary hearing." *See supra* text accompanying notes 38-45.

opinion in *Michael Williams v. Taylor*.[59] There, the Court addressed a habeas petitioner's entitlement to an evidentiary hearing under § 2254(e)(2):

> For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a *full and fair* adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met . . . . Yet comity is not served by saying a prisoner "has failed to develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2).[60]

The Court's use of the phrase "full and fair" evinces its concern for the quality of the state court process. Indeed, the Court refused "to attribute to Congress a purpose or design to bar evidentiary hearings for diligent prisoners with meritorious claims just because the prosecution's conduct went undetected in state court."[61]

In explaining its statutory interpretation, the majority complains that Valdez would have the court apply the full and fair hearing requirement to a deferential scheme as to conclusions of law and mixed questions of law and fact

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[59] 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000).

[60] *Id.* at 437, 120 S.Ct. 1479 (emphasis added).

[61] *Id.* at 434-35, 120 S.Ct. 1479.

that did not exist prior to the AEDPA, thereby rendering null the amendments enacted by Congress. But Valdez merely asserts that the AEDPA does not address the precise issue presently before the court. Moreover, his argument suggests that the amendments should be interpreted in a manner that comports with traditional notions of constitutional due process. It is a "cardinal principle" that if it is "fairly possible" to construe an act of Congress to avoid a constitutional question, then the statute should be interpreted in that way.[62] The majority holds that the AEDPA prohibits a federal court from examining the process by which the state court arrived at its decision. This holding raises serious constitutional questions. As stated by Professor Yackle: "In the preclusion context, the Supreme Court has said that federal courts need not respect state judgments unless litigants had a 'full and fair opportunity' to litigate their claims in state court . . . and has made it clear that, at a minimum, the measure of that opportunity is due process in the constitutional sense."[63] These teachings apply with equal force to the present case. Furthermore, in his concurring opinion in *Terry Williams v. Taylor,*[64] Justice Stevens found:

> A construction of AEDPA that would require the federal courts to cede th[e] authority [to interpret

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[62] *Crowell v. Benson,* 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932). *See also United States v. X-Citement Video,* 513 U.S. 64, 73, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.").

[63] Yackle, *supra* note 22, at 141 n. 21 (citing *Allen v. McCurry,* 449 U.S. 90, 95, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 481, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)).

[64] 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

> federal law] to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.[65]

This uncertainty as to Congressional intent places the majority's advancement of deference without regard to whether due process was afforded in the state court on shaky ground. A more solid interpretation of the AEDPA would be one that observes ordinary constitutional due process standards.

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[65] *Id.* at 379, 120 S.Ct. 1495. The Court's construction of § 2254(d)(1) in *Terry Williams* does not eliminate all constitutional concerns. Liebman and Hertz observe:

> Although Terry Williams' *certiorari* petition contended, *inter alia*, that Congress, via section 2254(d)(1), cannot constitutionally bar a federal court from granting habeas corpus relief from a state court decision of law that the federal court independently adjudges to violate federal law in effect when the state court ruled, . . . the Supreme Court denied *certiorari* on that question, . . . and neither of the two majority opinions in *Williams* addressed it. . . . The question of section 2254(d)(1)'s constitutionality remains open, therefore, and may be decisive in the rare close case in which the Court's interpretation of section 2254(d)(1) bars a federal habeas corpus court from issuing the writ despite independently concluding . . . that a state court custodial judgment violates the United States Constitution.

2 LIEBMAN & HERTZ, *supra* note 28, § 30.2d (Supp.2000).

D. *The AEDPA, "Deference," and Other Circuits*

In *Miller v. Champion,*[66] the Tenth Circuit recognized that:

> [Although] [f]ederal courts entertaining habeas petitions must give a presumption of correctness to state courts' factual findings, . . . [t]his presumption of correctness does not apply . . . if the habeas petitioner did not receive a full, fair, and adequate hearing in the state court proceeding on the matter sought to be raised in the habeas petition.[67]

Whereas the district court cited *Miller* in support of its decision, the majority declines to adopt its approach and declares that *Miller* rests on "tenuous footing" because the Tenth Circuit relied on its pre-AEDPA jurisprudence.[68] This conclusion, however, ignores the reality that every circuit, including this one, has continued to apply pre-AEDPA cases in appropriate circumstances.[69] The court in *Miller* clearly held, *post-AEDPA,* that the failure of a state court to conduct a full and fair evidentiary hearing precluded

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[66] 161 F.3d 1249 (10th Cir.1998).

[67] *Id.* 1254 (quoting *Nguyen v. Reynolds,* 131 F.3d 1340, 1359 (10th Cir.1997)).

[68] *See* Maj. Op. at 952.

[69] In interpreting the AEDPA, even the Supreme Court "thus far has paid rather close attention to its own precedents. . . . " 1 LIEBMAN & HERTZ, *supra* note 28, § 2.2, at 14 n.13 (citing *Hohn v. United States,* 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998); *Stewart v. Martinez-Villareal,* 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998); *Calderon v. Thompson,* 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)).

AEDPA's deference to the state court's mixed law and fact conclusions.[70]

Casting aside the Tenth Circuit decision, the majority relies instead on the "Fourth Circuit's view of AEDPA deference."[71] The majority opinion discusses the Fourth Circuit's *en banc* decision in *Bell v. Jarvis.*[72] In *Bell,* the petitioner was convicted of multiple counts of sexual misconduct. While direct appeal and state post-conviction review were denied summarily by the North Carolina state courts, the federal habeas courts evaluated the petitioner's constitutional claims with a much closer degree of scrutiny. The district court denied habeas relief. On appeal, a divided panel of the Fourth Circuit reversed the district court's ruling and granted habeas relief. But on rehearing *en banc,* the full Fourth Circuit affirmed the district court's denial of relief.

In the course of its ruling, the *en banc* court had occasion to reconsider, with guidance from *Terry Williams,* the application of 28 U.S.C. § 2254(d)(1) to state court summary affirmances. It interpreted *Terry Williams* to mean that the only question remaining after AEDPA was "whether the state court's adjudication of the claims before it was a reasonable one in light of the controlling Supreme Court law."[73] Finding that *Terry Williams* left it no choice but to overrule an earlier line of cases that allowed federal habeas courts to independently ascertain whether constitutional rights were violated when the state courts had not

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[70] *See Miller,* 161 F.3d at 1254.

[71] Maj. Op. at 952.

[72] 236 F.3d 149 (4th Cir.2000).

[73] *Id.* at 162.

articulated their reasoning, the majority concluded that, under AEDPA, federal courts are "no longer permitted to review de novo [state court] decisions on the merits."[74] It also concluded that whether or not there was, in fact, a constitutional violation "is not an essential part of the inquiry under § 2254(d)."[75] For a number of reasons, the majority's invocation of *Bell* is cause for concern.

First, *Bell*'s analytical method is flawed. When *Terry Williams* is read along with *Weeks v. Angelone*[76] (decided just before *Terry Williams*) and *Ramdass v. Angelone*[77] (decided soon after *Terry Williams*), it becomes clear that "federal courts should adjudicate habeas corpus claims by first performing the court's traditional function of analyzing the merits of the federal constitutional claim"[78] and only then assessing whether § 2254(d)(1) precludes habeas relief even though the court has found a constitutional violation.[79] The Fourth Circuit never determined whether

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[74] *Id.* at 163.

[75] *Id.*

[76] 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000).

[77] 530 U.S. 156, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000).

[78] 2 LIEBMAN & HERTZ, *supra* note 28, § 30.2c (Supp.2000).

[79] *See Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir.2000) (relying on *Terry Williams* to "hold that, when analyzing a claim that there has been an unreasonable application of federal law, we must first consider whether the state court erred; only after we have made that determination may we then consider whether any error involved an unreasonable application of controlling law within the meaning of § 2254(d)"; "Requiring federal courts to first determine whether the state court's decision was erroneous, prior to considering whether it was contrary to or involved an unreasonable application of controlling law under AEDPA, promotes clarity in our own constitutional jurisprudence and also provides guidance for state courts, which can look to our decisions for their persuasive value. . . . Such a rule also respects our

(Continued on following page)

a constitutional violation occurred. Instead, it contented itself with the general finding that the state court result was not unreasonable, even though the state court had denied relief summarily without identifying a federal rule of decision.

Second, the *Bell* court simply did not consider whether the state court denied the petitioner a full and fair hearing. Although the majority states that *Bell* implies that there is no full and fair hearing requirement under the AEDPA, the Fourth Circuit kept its focus on the summary nature of the state court's disposition.

Finally, the majority generally advocates the "sweeping" view of "AEDPA deference" championed by the Fourth Circuit.[80] But in *Terry Williams,* Justice Stevens issued a reminder "that the word 'deference' does not appear in the text of the statute itself."[81] Furthermore, in *Van Tran v. Lindsey,*[82] the Ninth Circuit recognized that in *Terry Williams:*

> [T]he Court rejected the interpretation, adopted in various forms by the Fourth, Fifth, Seventh, and Eleventh Circuits, that defines reasonableness on the basis of whether "reasonable jurists" could disagree about the result reached by the state court. Instead, the Court adopted an "objectively unreasonable" standard, employing the language used in decisions by the Third and

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duty, as Article III judges, to say 'what the law is.'") (quoting *Terry Williams,* 529 U.S. at 378, 120 S.Ct. 1495 (Stevens, J., concurring)).

[80] *See* Maj. Op. at 952-53.

[81] *Terry Williams,* 529 U.S. at 386, 120 S.Ct. 1495 (Stevens, J., concurring).

[82] 212 F.3d 1143 (9th Cir.2000).

> Eighth Circuits. We think it significant that the Third and Eighth circuits adopted that test, rather than the tests developed by other circuits, because they determined that the other circuits' tests were too deferential. The Supreme Court thus chose to adopt the interpretation of AEDPA that espoused the more robust habeas review.[83]

In *Gardner v. Johnson,*[84] we noted the "insightful observation" made in *Van Tran* and agreed that the rejection of the "reasonable jurists" standard as "too deferential" to state courts clearly implies that the Supreme Court in *Terry Williams* "preferred a more stringent habeas review of state court decisions."[85] Consequently, the majority's desire for broad, sweeping, and unchecked deference to state court adjudications finds no support in the precedents of either the Fifth Circuit or the Supreme Court.

*Bell* provides no basis for overturning the district court's ruling, particularly since the district court relied on the Tenth Circuit's approach in *Miller,* which is both analytically sound and relevant to the present case.

## *III. Conclusion*

My greatest disappointment with the majority opinion concerns my colleagues' apparent belief that silence in the text of the AEDPA signifies affirmative repudiation by Congress of the pre-existing body of habeas corpus law, including "general notions of procedural regularity and

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[83] *Id.* at 1150-51.

[84] 247 F.3d 551 (5th Cir.2001).

[85] *Id.* at 559-60.

substantive accuracy."[86] Although the majority's approach may constitute sound statutory construction in appropriate instances, in the present case it ignores the delicate balance struck by the Supreme Court among competing concerns of federalism, due process, Article III jurisdiction, faithfulness to Congressional enactments, and the importance of the Great Writ to our legal tradition.[87] *Townsend v. Sain* has life remaining and, in the present case, it supports the district court's determination that, where there had been a denial of a full and fair hearing before the state habeas court, the AEDPA's review provisions, as set forth in 28 U.S.C. §§ 2254(d) and (e), did not apply. Thus, for the foregoing reasons, I respectfully dissent.

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[86] *See supra* text accompanying note 28.

[87] The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Alexander Hamilton proclaimed the necessity of this provision in the following manner:

> Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.

THE FEDERALIST No. 83, at 562-63 (Alexander Hamilton) (J.E. Cooke ed., 1961). *See also Brecht v. Abrahamson*, 507 U.S. 619, 650, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (O'Connor, J., dissenting) ("[D]ecisions concerning the Great Writ warrant restraint, for we ought not take lightly alteration of that fundamental safeguard against unlawful custody.") (internal quotations and citations omitted).

**Alberto VALDEZ, Petitioner,**

**v.**

**Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.**

**No. CIV A C-98-040.**

United States District Court,
S.D. Texas,
Corpus Christi Division.

Sept. 28, 1999.

Jeffrey Scott Levinger, Carrington Coleman, Sloman & Blumenthal, LLP, Dallas, TX, William D. Underwood, Waco, TX, for Petitioner.

Erik E. Cary, Minter Joseph & Thornhill, PC, Austin, TX, Gregory S. Coleman, Austin, TX, for Respondent.

## *ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS*

JACK, District Judge.

On this day came on to be considered Petitioner Alberto Valdez's ("Valdez") petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. For the reasons stated herein, the Court GRANTS Petitioner's writ. The State of Texas (the "State") is hereby ORDERED, within the next 90 days, either to: (1) conduct a new trial on the issue of sentencing, as permitted by Tex.Code Crim.Proc. art. 44.29(c); or (2) vacate Petitioner's sentence and impose a sentence less than death.

## *I. JURISDICTION*

The Court has jurisdiction over this habeas petition pursuant to 28 U.S.C. § 2254(a).

## *II. FACTS AND PROCEEDINGS*

In May 1988, a Texas jury found that Valdez had shot and killed a police officer, Joseph D. Bock ("Bock"), with the officer's own gun while attempting to escape arrest. In the sentencing phase of Valdez's trial, the jury answered affirmatively both of the special questions posed to it pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure,[1] thereby subjecting Valdez to the death penalty. In light of these two answers, the trial judge sentenced Valdez to death. Texas appellate courts uniformly denied Valdez's appeals, and the United States Supreme Court denied certiorari.[2] In January 1990, Valdez was appointed new counsel to pursue collateral review of his conviction, and subsequently Valdez filed a state habeas petition. In 1990, the Texas state habeas court held an evidentiary hearing to consider Valdez's petition. Over six years later,

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[1] Article 37.071(b) states:

> "On conclusion of the presentation of the evidence, the court shall submit the following . . . issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Tex.Code Crim.Proc. art. 37.071(b).

[2] Two justices voted to grant certiorari.

in 1997, that Texas court denied his request for habeas relief. Valdez timely filed the instant § 2254 petition in this Court.

Officer Bock's death was both needless and senseless. It was a tragedy of the sort that shatters lives, hardens hearts, and leaves many painful questions unanswered. In all reasonable probability, however, Valdez himself would not be on death row today but for his trial counsels' complete and utter failure to investigate and present available and compelling mitigating evidence to the jury during the sentencing phase of his capital murder trial. Almost everything the jurors learned about Valdez in sentencing was what the State told them: that Valdez had an extensive but non-violent criminal record. The jury was never provided the following available evidence: that this murder was the only violent episode in Valdez's life; that Valdez is mentally retarded; that Valdez was a positive influence on the lives of the people around him despite his childhood of physical and emotional abuse; and that Valdez had an exemplary record of good conduct while in prison and jail.

Clearly, Valdez deserved a punishment of severe magnitude for this heedless crime. Nonetheless, had his trial counsel discovered and presented the mitigating evidence about Valdez, there is a reasonable probability that the jury would not have found that Valdez "would commit criminal acts of violence in the future" and, thus, would not have given him the death sentence. Moreover, withholding this information from the jury was not the result of any informed judgment or strategic decision by trial counsel. As the evidence showed during both the state habeas hearing and this Court's evidentiary hearing, the jury did not learn who Valdez was before deciding whether

he should die as trial counsel did not take the time to learn who Valdez was. Trial counsel had done no investigation in preparation for the sentencing phase, and thus never bothered to learn about the critical mitigating evidence that any reasonable defense attorney should have and would have uncovered and presented.

For these compelling reasons – and with the utmost sympathy, respect, and concern for all those persons who yet mourn for Joseph Bock – this Court must GRANT Valdez's application for writ of habeas corpus.

## *III. FINDINGS OF FACT*

Valdez had a turbulent childhood hallmarked by neglect, deprivation, and abuse. At home, Valdez was frequently subjected to wanton beatings by his alcoholic father. (Evid. Hrg. Trans. Vol. I, at 290-91, 322-26.) Valdez was targeted for these beatings more often than his other siblings because he was perceived as "his mother's favorite." (*Id.* at 294.) When Valdez's father was not punishing his son physically, he was devising strange and embarrassing punishments for Valdez and his siblings (such as stripping them of all their clothes for hours), (*id.* at 293), and prohibiting their friends from visiting the house, (*id.* at 298). Valdez was annually taken out of school to work in the beet fields of Colorado. (*Id.* at 297-98.)

At school, Valdez failed consistently, and, when entering sixth grade at 13, was administered the Wechsler Intelligence Scale for Children by a certified school district examiner. (Evid. Hrg. Trans. Vol. I, at 57-59; Pet.'s Ex. 3.) On this test, Valdez received I.Q. scores of 60 Verbal, 74

Performance, and 63 Full Scale.[3] (*Id.* at 58.) Due to these low scores, Valdez was recommended for special education classes. (*Id.*) However, Valdez, who was failing every academic subject, dropped out of school before attending these classes. (*Id.* at 59.) Also, beginning at around age 14, Valdez frequently abused alcohol, marijuana, amphetamines, barbiturates, and a variety of inhalants. (Evid. Hrg. Trans. Vol. II, at 78; Pet.'s Ex. 2.)

In 1974, at age 18, Valdez was arrested in Hockley County, Texas for auto theft. (Pet.'s Ex. 2.) Valdez's court-appointed attorney recognized that Valdez may suffer from a mental deficiency of some sort, and so he obtained a court-ordered psychiatric evaluation. (Evid. Hrg. Trans. Vol. I, at 49-50.) The State's doctor diagnosed Valdez with "borderline intelligence" and "very mild signs of organic factor," attributing the latter to Valdez's long term abuse of inhalants. (*Id.* at 52; Pet.'s Ex. 2.) Like the school district, the doctor administered a Wechsler examination on Valdez. On this test, Valdez scored 64 Verbal, 65 Performance, and, again, 63 Full Scale.[4] (*Id.*) The doctor noted that Valdez's "fund of information" was poor, citing Valdez's inability to state the number of months in a year and to describe a thermometer. (*Id.*) The doctor also opined that

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[3] The Wechsler test is administered to children or adults one-on-one by either a psychologist or a certified examiner. As the Supreme Court reported in *Penry v. Lynaugh*, 492 U.S. 302, 308 n. 1, 109 S.Ct. 2934, 2941 n. 1, 106 L.Ed.2d 256 (1989), individuals with I.Q. scores between 50-55 and 70 have "mild" retardation, and approximately 89% of retarded persons are "mildly" retarded.

[4] Notably, Valdez received a 63 Full Scale score on both Wechsler exams. There is a nine point difference between his Performance scores, but this difference is not beyond the bounds of the standard deviation since the Wechsler test has an accuracy of plus or minus five points. (Evid. Hrg. Trans. Vol. I, at 353.)

Valdez's "judgment is impaired," that "his social skills are poor," and that his "chief defense is denial." (*Id.* at 52-53.)

Despite this harsh upbringing, history of academic failure, and habitual substance abuse, Valdez grew into some emotional maturity in his adulthood, as related by the friends and family members with whom he developed stable and loving relationships.[5] He was a positive influence on the children of his siblings, pushing them to obey their parents, stay in school, and keep out of trouble. (Evid. Hrg. Trans. Vol. I, at 275-76, 279-80; *id.* Vol. II, at 180-82, 205-06, 210, 224-25.) His family testified to a history of non-violence, an aversion to confrontation, and devotion to family. (*Id.* Vol. I, at 245-46, 275-76, 301; *id.* Vol. II, at 181-82, 206-07, 223-24.)

In September 1986, Valdez was arrested on suspicion of burglary of a Corpus Christi bar. (State's Trial Ex. 100.) By that time, he had previously been convicted of five crimes (the aforementioned auto theft, two forgeries, burglary, and receipt of a firearm by a felon).[6] (State's Trial. Ex. 94-98.) The Judge of the 117th State Judicial

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[5] The following description comes from various persons close to him, including Olga Quintanilla, his sister; David Valdez, his brother; Shirley Lopez, his sister; Cynthia Martinez, Valdez's niece; Monica Lopez, another niece; Mary Jane Barrientes, a friend; Alexandra Banuelos Rodriguez and Jo Anna Banuelos, Valdez's stepdaughters; and Julio Garcia, the Mayor of Robstown, Texas. All of these persons (except Garcia) claim that they would have testified at trial. (Evid. Hrg. Trans. Vol. I, at 284-85, 308-09, 331-32; *id.* Vol. II, at 185-86, 197-98, 211-12, 232-33.) Most did not; for those that did, their testimony was cursory and stilted. *See* discussion *infra,* pp. 775-76.

[6] Also, the record before the Court indicates that, when twelve years old, Valdez was arrested for a burglary and placed in a youth facility.

District released Valdez on bond. In December 1986, he was arrested again on suspicion of a separate burglary. (State's Trial Ex. 99.) The same judge again released Valdez on bond, apparently not aware that there was also a federal warrant out for Valdez's arrest (for parole violations) at that time. (Trial Trans. Vol. XI, at 570.) In January 1987, Valdez appeared before the Judge of the 117th State Judicial District for arraignment, who allowed him to remain free on his bond. On September 9, 1987, while out on bond, Valdez was arrested on suspicion of murdering a police officer. This is the charge at the root of this petition.

### A. The Offense

On September 9, 1987, Sergeant J.D. Bock of the Corpus Christi Police Department was issuing a traffic citation on the roadside, when a car driven by Valdez passed by at a high rate of speed.[7] Bock shouted at Valdez and then pursued him in his squad car. An eyewitness testified at trial and indicated that Valdez was alone in his car when he passed Bock. Bock chased Valdez at speeds topping 100 m.p.h., and the chase apparently lasted until Valdez's vehicle blew a tire at the edge of a field outside of town. A driver who had followed the chase and then lost sight of the vehicles for about 30 seconds soon arrived at the scene. He saw Bock and Valdez wrestling, heard a gun discharge, and saw Bock bend over and fall down. The driver ran back to his own truck, heard a second shot, and

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[7] A more detailed description of the entire incident is recounted in *Valdez v. State,* 776 S.W.2d 162, 164-65 (Tex.Cr.App.1989) (en banc).

then a third that went through his own rear window. As he drove away, the driver heard two more shots.

After a manhunt in the area, police officers found Valdez hiding in a field after running through a nearby farmhouse. The owner of the farmhouse, who spoke briefly with Valdez, was unharmed. In the farmhouse, underneath the cushions of a sofa, the police found Bock's service revolver. Bock's autopsy revealed that he was killed by four shots from his own gun, a .357 revolver.

Bock was only the third police officer killed in Corpus Christi history, and his shooting came as a staggering blow to the community. Local newspapers published over thirty stories about his tragic death, and the city dedicated a park in his memory.

### B. The Trial

The case was assigned once again to the 117th Judicial District. The court appointed Carl Lewis ("Lewis") as Valdez's defense counsel, who, at the time, had no experience trying capital cases.[8] (Evid. Hrg. Trans. Vol. I, at 21.) As his co-counsel, Lewis chose David Gutierrez ("Gutierrez"), who likewise had no experience representing capital defendants. (*Id.* at 21-22.)

Between the two of them, Valdez's attorneys spent a total of 59 hours preparing for his case.[9] (Pet.'s Ex. 6-7.)

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[8] Two weeks prior to Valdez' trial in May 1988, Lewis finished a capital trial in which the client was also sentenced to death. (Evid. Hrg. Trans. Vol. I, at 22-24.)

[9] Gutierrez stated that he did not record time for phone calls which were only a few minutes. (Evid. Hrg. Trans. Vol. III, at 90.) Lewis speculated that some of the hours logged might have been spent

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According to the fee applications of the two attorneys, none of this preparation time was spent searching for mitigating evidence in connection with the sentencing phase. (*Id.*) Lewis, in fact, logged no work at all between December 13, 1987 and April 21, 1988. The trial began on May 2, 1988. (Evid. Hrg. Trans. Vol. I, at 32-33; Pet.'s Ex. 6.) Gutierrez spent less than 3 hours on trial preparation after December 13, 1987, none of which concerned the sentencing phase. (Evid. Hrg. Trans. Vol. III, at 90, 105, 136; Pet.'s Ex. 7.) The attorneys' fee applications reflect that Lewis spent about 9 hours visiting Valdez prior to trial while Gutierrez spent about 2 hours with him. (Pet.'s Ex. 6-7.) These documents also indicate that Lewis spoke just once with one of Valdez's family members (a twelve-minute phone conversation in October 1987 with a woman identified as Valdez's wife [10]), (Evid. Hrg. Trans. Vol. I, at 33; Pet.'s Ex. 6), and that Gutierrez met just once with unidentified family members for about half an hour in November 1987, (Pet.'s Ex. 7). According to a family member at that meeting, Gutierrez asked no questions about Valdez's background nor otherwise requested any assistance in connection with the sentencing phase. (Evid. Hrg. Trans. Vol. I, at 306-07.) Despite having funding for an investigator, his attorneys did not hire one to assist them. (*Id.* at 29.) Due to the notoriety of the case among the local law enforcement population, the local investigators contacted by Lewis and Gutierrez refused to assist. (*Id.* at 26, 105; *id.* Vol. III, at 132.) Lewis did not make any

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discussing sentencing issues with family members prior to trial, but could not recall which ones. (*Id.* Vol. I, at 43-44.) Both attorneys testified that their fee applications were fairly accurate. (*Id.* Vol. I, at 32; *id.* Vol. III, at 90.)

[10] While he lived with a girlfriend, Valdez was not married.

attempt to interview or hire investigators from outside Corpus Christi. (*Id.* Vol. I, at 27; *id.* Vol. III, at 132.)

While Lewis and Gutierrez did review the "penitentiary packs" provided to them by the State,[11] (*id.* Vol. I, at 47), they did not subpoena or gather any documents which could support a case for mitigation, (Pet.'s Ex. 6-7). Since the attorneys did not obtain Valdez's school records, (Evid. Hrg. Trans. Vol. I, at 55; *id.*, Vol. III, at 154-55), they did not learn that he tested as mentally retarded in sixth grade and was recommended for special education,[12] (*id.* Vol. I, at 57-60; Pet.'s Ex. 3). Since they did not obtain complete pleadings regarding his 1974 Hockley County conviction, (Evid. Hrg. Trans. Vol. I, at 48, *id.* Vol. II, at 154), they did not learn that the State's doctor also found his test scores to indicate mental retardation, (*id.* Vol. I, at 49-53; Pet.'s Ex. 2). Similarly, since they did not obtain full records regarding his previous convictions, (Evid. Hrg. Trans. Vol. I, at 48; *id.* Vol. III, at 97), the attorneys did not learn that the underlying facts of those convictions reflected the activities of a somewhat hapless thief, rather than a violent and calculating criminal.[13] (State's Trial Ex.

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[11] A "penitentiary pack" or "pen pack" consists chiefly of the judgment and sentencing order from the underlying criminal case. (*E.g.*, State's Trial Ex. 94.) It does not include pleadings or pretrial motions from that case, police reports, psychological examination records, or school records. (Evid. Hrg. Trans. Vol. I, at 47-48.)

[12] Valdez's school records were located less than one block from the courthouse in which his capital trial occurred.

[13] For example, in attempting a forgery, Valdez took a blank personal check that he found, wrote his own name in the payee blank, signed the check with his own name, and presented the check for cashing. (State's Trial Ex. 94.) When arrested once for burglary, he had broken into a closed bar in order to take the change from the cigarette machine. (Trial Trans. Vol. XIII, at 77-78.)

94-98.) Nor did they speak to Valdez's family or friends in order to learn of his humanizing qualities. (Evid. Hrg. Trans. Vol. I, 85-88; *id.* Vol. III, at 161.) Lewis and Gutierrez also never learned that, in the seven months Valdez spent in the Nueces County Jail between his arrest and trial, he was described by his supervisor as a well-behaved, well-adjusted, and disciplined member of prison society. (*Id.* Vol. I, at 76-77, 263-67.)

According to Lewis and Gutierrez, as they entered the guilt/innocence phase of the trial, it was already determined that Valdez would take the stand and give an alibi. (*Id.* Vol. I, at 155-56; *id.* Vol. III, at 126.) At voir dire, however, counsel focused extensively on the jurors' views of self-defense, provocation, and police brutality, (*id.* Vol. III, at 126; *e.g.,* Trial Trans. Vol. V, at 213-16), and then promptly dropped these issues thereinafter at trial. Valdez insisted on telling the jury the following alibi: a man he knew only as "Chico" was riding with him when Bock pulled him over; as Bock was arresting Valdez, Chico shot Bock with his (Chico's) own .38 caliber pistol; Chico then took his packages of drugs from Valdez's car and disappeared, running into the adjacent field. (Trial Trans. Vol. XII, at 756-60.) Lewis reported that this alibi was met by the jury and courtroom crowd with sighs, eye-rolling, and snickering. (Evid. Hrg. Trans. Vol. I, at 122.) In a bench conference, the trial judge told the attorneys that "never in [his] career" had he heard an alibi like the one which Valdez had just told. (Trial Trans. Vol. XII, at 777.)

The jury found Valdez guilty on a Friday afternoon. (*Id.* Vol. XII, at 923.) On the following Monday morning, the State put on its case for the sentencing phase. The State introduced penitentiary packets corresponding to Valdez's previous convictions, and produced evidence as to

two other burglary arrests. (*Id.* Vol. XIII, at 7-79.) When the State closed, the defense attorneys expressed to the judge their desire to use the lunch break to figure out what witnesses, if any, they would present in Valdez's case for mitigation. (*Id.* at 79.) The following colloquy took place:

> Mr. Jones[14]: The State rests.
>
> The Court: Are you all ready?
>
> Mr. Lewis: Your Honor, we'd like to break for lunch at this time.
>
> The Court: Come up just a second.
>
> (At this time the following whispered bench conference was held:)
>
> The Court: Do you have anybody to present now?
>
> Mr. Lewis: We have some people that we want to filter through, and I'd be rushed into deciding to call somebody up.
>
> The Court: You had all weekend.

(*Id.* at 79-80.) The court then dismissed the jury and again asked the defense attorneys if they would have any mitigating evidence. Gutierrez replied: "We need to find out." The Court responded, "You need to find out?" "Yes, sir," said Gutierrez. (*Id.* at 80.) The Court's surprise at Gutierrez's response was apparent.

Lewis then went out to the hall where Valdez's family and friends were congregated. None of them had been subpoenaed or asked to attend the trial; the individuals

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[14] Assistant District Attorney.

present simply happened to be there on that day out of their concern for the proceedings. (Evid. Hrg. Trans. Vol. I, at 308, 331; *id.* Vol. II, at 228.) It appears that Lewis then briefly interviewed, for the first time, those who were willing to testify.[15] (State Habeas Hrg. Vol. I, at 61-62; Evid. Hrg. Trans. Vol. I, at 42; *id.* Vol. II, at 227-32.) According to Gutierrez, some of Valdez's friends and family were afraid to testify because they were worried about police officer retaliation. (Evid. Hrg. Trans. Vol. III, at 98-99.) Lewis arranged to present five character witnesses.

After lunch, Lewis successfully called four of these five witnesses.[16] In brief examinations that reflected no advance preparation, Lewis elicited cursory testimony to the effect that Valdez was a pleasant individual who especially cared for children. (Trial Trans. Vol. XII, at 81-98.) In the printed trial transcript, the testimony of these four witnesses totals less than twenty pages, including the taking of oaths, bench conferences, and cross-examination. When Lewis attempted to call one of the five witnesses, the bailiff announced in the presence of the jury: "He is not outside, and this other witness says he is not coming." (*Id.* at 87.) Except for an unsworn statement by Valdez (where he both asserted his innocence and expressed his contrition),

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[15] Within Lewis' case file, there are notes reflecting brief interviews with four persons: Daniel Valdez, Mary Jane Barrientes, Maria Irma Saldana, and Sammy Quintanilla. (Evid. Hrg. Trans. Vol. I, at 99.) Three of these four persons testified. Since Lewis reported just one phone call with Valdez's "wife" in preparation for the trial and since this is the only interview session Lewis can recall, it appears that these notes were made during the impromptu interviewing session.

[16] He called Daniel Valdez, one of Valdez's seven siblings; Mary Jane Barrientes, a former girlfriend of Valdez; Julia Saldana, the current girlfriend of Valdez; and Marcia [sic] Irma Saldana, the mother of Julia Saldana.

(*id.* at 120-21), the defense attorneys presented no other evidence in mitigation.

Lewis's closing argument largely omitted any mitigating factors surrounding Valdez's character or the circumstances of the shooting, and completely neglected to mention the non-violent nature of Valdez's prior convictions. (*Id.* at 121-30.) The jury returned answers to the special sentencing issues which mandated a penalty of death.

### C. Habeas Corpus Proceedings

After his direct appeals failed, Valdez filed a state habeas petition. In November 1990, the state habeas judge held a two-day evidentiary hearing. Valdez's primary argument at that hearing was that his attorneys had rendered ineffective assistance of counsel at trial. (State Habeas Hrg. Trans. Vol. I, at 1-16.) No further action was taken on the petition until February 1997. At a hearing on the petition, the state habeas judge stated "I have never read the record of the trial and I don't intend to. I don't have the time."[17] (State Hrg. on Prop. Find. & Concl. Law, 144-45.) The judge also stated that the court could not locate the exhibits that were admitted into evidence at the November 1990 hearing. (*Id.* at 148-49.) In March 1997, apparently without having located those exhibits and without having requested replacements for them, the judge denied Valdez's habeas petition, entering findings of fact and conclusions of law that essentially repeated verbatim the State's proposed findings and conclusions.

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[17] The trial judge having recused, the habeas judge did not have the benefit of sitting at the trial.

(Trial Ct.'s Find, Fact & Concl. Law.) The Texas Court of Criminal Appeals then denied relief in a one page order. (Ct.Crim.App.Order.)

On January 30, 1998, Valdez timely filed the instant § 2254 petition. On January 11, 1999, this Court granted Valdez's motion for an evidentiary hearing on the issue of whether his Sixth Amendment right to effective counsel had been violated during the sentencing phase. Finding that the state habeas court's own errors had prevented Valdez from properly presenting his evidence of this ineffective assistance argument to the state habeas court, the Court determined that 28 U.S.C. § 2254(e)(2) did not bar an evidentiary hearing in federal court. *McDonald v. Johnson,* 139 F.3d 1056, 1059 (5th Cir.1998); *Miller v. Champion,* 161 F.3d 1249, 1253 (10th Cir.1998). The Court also found that Valdez had not received a "full and fair" evidentiary hearing, *Townsend v. Sain,* 372 U.S. 293, 312-13, 83 S.Ct. 745, 757, 9 L.Ed.2d 770 (1963), *overruled on other grounds, Keeney v. Tamayo-Reyes,* 504 U.S. 1, 5, 112 S.Ct. 1715, 1717, 118 L.Ed.2d 318 (1992), and therefore that he was entitled to an evidentiary hearing on the issue. *Wiley v. Puckett,* 969 F.2d 86, 98 (5th Cir.1992).[18]

From June 21 through 23, 1999, this Court held an evidentiary hearing where Valdez's counsel presented evidence excluded from consideration by the State Court. Furthermore, both parties thoroughly presented evidence and argument on the issue of whether Lewis and Gutierrez satisfied their constitutional duty to investigate Valdez's case. At the Court's request, the parties also

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[18] The Court also found that, even if Valdez was not entitled to a hearing, it was proper to exercise its discretion to grant one.

submitted briefing on this issue. The Court now considers Valdez's claim of ineffective assistance of counsel in light of this newly-presented evidence and the evidence already in the record.

## *IV. DISCUSSION*

### A. Standard of Review

Since Valdez did not file his federal habeas petition until 1998, the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") applies to this case. Subsection (d) of AEDPA limits the ability of federal courts to grant habeas relief to state prisoners. When reviewing a question of fact, a federal court may grant relief if the state court adjudication of the claim " 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence.' " *Drinkard v. Johnson,* 97 F.3d 751, 767 (5th Cir.1996) (*quoting* 28 U.S.C. § 2254(d)(2)). "[W]hen reviewing a mixed question of law and fact, a federal court may grant habeas relief only if it determines that the state court decision rested on 'an unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court,' to the facts of the case." *Id.* at 768 (*quoting* 28 U.S.C. § 2254(d)(1)). "When reviewing a purely legal question, a federal court may grant habeas relief only if it determines that a state court's decision rested on a legal determination that was 'contrary to . . . clearly established Federal law, as determined by the Supreme Court.' " *Id.*

Nevertheless, these standards of review largely do not apply since this Court has held an evidentiary hearing in order to consider evidence improperly excluded from consideration by the state habeas court. In denying Valdez's writ,

the state habeas court entered twenty findings and conclusions which pertain to Valdez's claim for ineffective assistance of counsel. A few of these findings were specific and apparently were not tainted by the fact that the state habeas judge had effectively excluded from evidence some of the most critical evidence of ineffective assistance of counsel.[19] The Court will presume that the specific and therefore untainted findings and conclusions of the state habeas court are correct;[20] however, since this Court has held an evidentiary hearing to consider evidence excluded from consideration by the state habeas judge, the Court will not defer to the more general conclusions that the attorneys conducted a reasonable investigation and that Valdez suffered no prejudice from the lack of presentation of a case of mitigation. That is, the Court addresses the ultimate conclusion regarding ineffective assistance of

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[19] Most importantly, it appears that the state habeas judge excluded (1) the trial transcript showing the stark lack of preparation of defense counsel for the sentencing phase as well as the prejudice resulting from the lack of preparation, (2) the attorneys' fee applications showing an utter lack of investigation into Valdez's background, and (3) the consistent Wechsler test scores showing Valdez to be mentally retarded. Since the state habeas judge excluded this evidence from his consideration, it appears he did not factor such elements into his conclusion that the defense attorneys conducted an adequate investigation.

[20] The most significant of these specific findings and conclusions are the following: "9. It is common in the Corpus Christi, Nueces County, Texas area for Hispanic males to drop out of school; 10. The fact that applicant had dropped out of school did not put Carl Lewis on notice of any potential mental problem of applicant, if any; 11. Carl Lewis's failure to request the entire court jacket regarding applicant's burglary charge in Hockley County did not fall below the professional standard of conduct for defense attorneys." (Trial Ct.'s Find. Fact & Concl. Law.) Of course, these discrete findings and conclusions do not in themselves mandate a general finding that the Lewis and Gutierrez rendered constitutionally effective assistance of counsel.

counsel without the presumption that the state court's conclusion was correct. *Miller,* 161 F.3d at 1254 (holding that the "presumption of correctness does not apply . . . if the habeas petitioner did not receive a full, fair and adequate hearing in the state court proceeding on the matter sought to be raised in the habeas petition") (*citing Nguyen v. Reynolds,* 131 F.3d 1340, 1359 (10th Cir.1997), *cert. denied,* 525 U.S. 852, 119 S.Ct. 128, 142 L.Ed.2d 103 (1998)).

### B. Ineffective Assistance of Counsel

The Sixth Amendment " 'right to counsel is the right to the *effective assistance* of counsel' " for the reason that counsel plays "a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington,* 466 U.S. 668, 685-86, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) (*quoting McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763 (1970) (emphasis supplied)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[21] *Id.* at 686, 104 S.Ct. at 2064. Thus, to prevail on his ineffective assistance of counsel claim, Valdez must demonstrate both that his attorney's performance was deficient and that the deficiency prejudiced his defense. *Id.; Davis v. Johnson,* 158

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[21] The constitutional norms by which effectiveness of counsel is measured extend equally to the guilt and sentencing phases of capital trials. *Baldwin v. Maggio,* 704 F.2d 1325, 1332 (5th Cir.1983).

F.3d 806, 812 (5th Cir.1998), *cert. denied,* ___ U.S. ___, 119 S.Ct. 1474, 143 L.Ed.2d 558 (1999). The Fifth Circuit has determined that both prongs of the *Strickland* test involve mixed questions of law and fact. *Nobles v. Johnson,* 127 F.3d 409, 418 (5th Cir.1997), *cert. denied,* 523 U.S. 1139, 118 S.Ct. 1845, 140 L.Ed.2d 1094 (1998).[22]

### 1. Deficient Performance of Counsel

Valdez's fundamental complaint is that his attorneys failed to conduct a reasonable investigation into his background, that this failure was *not* the result of a strategic decision, and that this failure seriously prejudiced his case at the sentencing phase of his trial. In particular, Valdez brings evidence that his attorneys' entire investigation into his background consisted of the following: (1) one 12-minute phone call with someone inaccurately described as his "wife;" (2) one 30-minute conference with family members in one of the attorney's offices; (3) about 11 hours spent visiting Valdez in jail (without ever asking specific questions about his family background, upbringing, mental condition, etc.);[23] and, (4)

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[22] Normally, under the AEDPA deference scheme, a federal court will not disturb a state court's application of law to facts unless the state court's conclusions involved an "unreasonable application" of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1); *see Davis,* 158 F.3d at 812. However, as explained above, since the Court held an evidentiary hearing to consider substantial evidence which was improperly (and, apparently, largely accidentally) excluded by the state habeas judge, this Court need not defer to the general conclusions of the state habeas judge regarding the deficiency of the attorneys' investigation and the resulting prejudice to Valdez. *See* discussion *supra,* pp. 777-78.

[23] Lewis testified during the instant hearings that these meetings were geared toward the guilt/innocence phase of the trial. (Evid. Hrg. Trans. Vol. I, at 43-45.)

the extemporaneous lunch break interviews with about five family members and friends. The evidence that these acts were the extent of the attorneys' investigation is unrebutted and appears accurate, and therefore the Court FINDS that these acts substantially compose the entirety of the attorneys' investigation into Valdez's background.

Further, Valdez complains that this superficial investigation failed to reveal substantial mitigating evidence that would have convinced at least one juror to refuse to choose the death penalty for him. That substantial yet undiscovered evidence consists primarily of the following: the two Wechsler exams showing mental retardation, the school records placing Valdez in special education, the consistent testimony of siblings that Valdez's father specially focused his physical abuse on Valdez as a child, the testimony from family and friends as to his redeeming personal qualities despite this history of abuse, the testimony of the Nueces County Jail Supervisor that Valdez had been a "model prisoner" while awaiting his capital trial, and the fact that the underlying circumstances of his previous convictions suggest that Valdez was a thief but not a violent criminal.

In *Strickland,* the Supreme Court offered a non-exhaustive list of the basic duties owed by counsel to the criminal defendant – viz., a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the defendant's cause, the duty to consult with the defendant on important decisions, the duty to keep the defendant informed of important developments in the course of the prosecution, and the "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688, 104 S.Ct. at 2065. An attorney's performance of such duties is deficient only when the representation falls below an objective standard of reasonableness:

"[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 687-88, 104 S.Ct. at 2064-65. This Court's review of the performance of Lewis and Gutierrez must be "'highly deferential,'" and the Court "'must make every attempt to eliminate the distorting effects of hindsight.'" *Davis,* 158 F.3d at 812 (*quoting Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.) Nevertheless, this measure of deference to the trial counsel "'must not be watered down into a disguised form of acquiescence.'" *Bouchillon v. Collins,* 907 F.2d 589, 595 (5th Cir.1990) (*quoting Profitt v. Waldron,* 831 F.2d 1245, 1248 (5th Cir.1987)).

In particular, the *Strickland* court explained that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. at 2066. If counsel can explain why his or her reasonable decision made a particular investigation unnecessary, then counsel was not ineffective. *Loyd v. Whitley,* 977 F.2d 149, 158 and n. 22 (5th Cir.1992) (gathering cases where the strategic decision excuse has been the "pivotal point"); *Cook v. Lynaugh,* 821 F.2d 1072, 1078 (5th Cir.1987) (finding ineffective assistance with emphasis on fact that failure to investigate was not strategic choice). Still, "[t]he Court is . . . not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Moore v. Johnson,* 185 F.3d 244, 261 (5th Cir.1999) (finding ineffective assistance where counsel failed to investigate, inter alia, background information concerning defendant's childhood abuse and impaired mental functioning).

"In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066. As the Fifth Circuit has explained, the nature of the case can bear some relation to the type of pretrial investigation required and that at least a minimal investigation must be done in any event:

> Although the scope of the required investigation is a function of the number of issues in the case, the relative complexity of those issues, the strength of the government's case and the overall strategy of trial counsel, this circuit has recognized that, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

*Nealy v. Cabana,* 764 F.2d 1173, 1177 (5th Cir.1985). The severity of the sentence faced by a defendant in a capital case is an important factor to be weighed in the effective assistance determination. *Washington v. Watkins,* 655 F.2d 1346, 1357 (5th Cir.1981). Furthermore, the attorney's duty to investigate is not diminished by the fact that counsel was appointed rather than retained and possibly limited to a fee cap. *Bouchillon,* 907 F.2d at 597 (noting that "there is a duty to investigate which cannot be abridged because counsel is only appointed, not retained").

This duty to make such a pretrial investigation can play a significant role where there is evidence that the defendant suffers from some type of mental deficiency. *Moore,* 185 F.3d 244, 270. Because a criminal defendant frequently makes only a limited appearance before the court, the Fifth Circuit has recognized that the defense

counsel is "the sole hope" that a mental deficiency will be brought to the attention of the court. *Bouchillon,* 907 F.2d at 597. The Supreme Court has also attached special importance to mitigating evidence concerning a capital defendant's good behavior while in prison, insofar as it bears on features of the defendant's character that militate against a claim of future dangerousness. *Skipper v. South Carolina,* 476 U.S. 1, 4, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986), *aff'd in part and rev'd in part on other grounds, Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Finally, counsel has a duty to investigate the nature of defendant's prior criminal history, especially when evidence of these previous crimes is likely to be raised by the prosecution at trial. *Moore,* 185 F.3d 244, 273-74.

Since the Court has found that the attorneys' investigation consisted of the four elements listed above,[24] the question for the Court is whether such an investigation into Valdez's background was reasonable under the circumstances.

Generally, any lawyer who tries capital murder cases knows that he or she "has a duty to investigate the client's life history, and emotional and psychological make-up" through an "inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present

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[24] Namely: (1) one 12-minute phone call with someone inaccurately described as his "wife;" (2) one half-hour conference with family members in attorney office; (3) about 11 hours spent visiting Valdez in jail (without ever asking specific questions about his family background, upbringing, mental condition, etc.); and, (4) the extemporaneous lunch break interviews with about five family members and friends.

feelings." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,* 58 N.Y.U. L.Rev. 299, 320, 323-24 (1983). Since the acquisition of mitigation evidence is so critical in any capital case, preparation for the sentencing phase must begin when counsel is first appointed. (*Id.* at 320.) Although Lewis and Gutierrez acknowledged throughout the record that they were aware of this duty, (Evid. Hrg. Trans. Vol. I, at 25-26; *id.* Vol. III, at 83), their performance demonstrates a complete lack of attention to it. Moreover, their deficiencies did not arise from any informed application of novel or esoteric legal tactics; rather, their deficiencies resulted from their total failure to perform rudimentary trial preparation and presentation tasks.

In this case, the State had a solid case for guilt since it had a witness of the struggle who heard the multiple gun shots and since forensic evidence showed that Bock was killed with his own handgun. The only possible rebuttal to the State's case on the guilt/innocence issue would be a denial of the shooting in direct contradiction of the State's evidence;[25] and, when Valdez tried this approach, he apparently provoked indignant disbelief from the jury. Thus, in these circumstances where there were no complex issues regarding guilt/innocence, the attorneys had reason to focus primarily on the case for mitigation, and, consequently, their "minimum" duty to interview potential

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[25] Gutierrez emphasized that he believed the best strategy would have been for Valdez to admit to having shot Bock, but to claim mitigation due to the fact that it occurred during the struggle. (Evid. Hrg. Trans. Vol. III, at 76-77.) This approach was foreclosed when Valdez decided to relate his alibi. As Gutierrez suggested, Valdez could have relied mostly on his own confession, which was tape recorded after his arrest. (*Id.* at 75.)

witnesses and investigate the case rested relatively heavily on their preparation for the sentencing phase.

Nevertheless, the attorneys made essentially no investigation into Valdez's background, even though the vast majority of it was available in Corpus Christi, where Valdez had lived most of his life. The attorneys never visited the family in their homes, and it appears they made no efforts to instigate (or even respond to) communications with potential witnesses for mitigation.[26] Even the impromptu lunch break interviews with friends and family appear to have consisted mainly of a discussion of Valdez's character, rather than his background.[27] The attorneys did not look at his local school records even though Valdez had dropped out at an early age. Except to review the penitentiary packets provided by the State, the attorneys did not look into his criminal history even though they were on notice that the State would use those prior convictions at the sentencing phase and even though Lewis himself had questions about the Hockley County conviction. (Trial Trans. Vol. XIII at 3-6.) The attorneys did not subpoena or

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[26] The Court notes that it is possible that Lewis took the affirmative action of calling a woman he believed to be Valdez's wife, although it is equally possible that she called him. While the attorneys mailed two letters to potential witnesses, it appears that these witnesses were sought for the guilt/innocence case. (Evid. Hrg. Trans. Vol. III, at 145-48.) Finally, Gutierrez's fee application reports a single conference with the family in his office; Valdez's sister, Olga Quintanilla, testified that she went looking for the attorneys one time and ended up speaking to an attorney other than Lewis. (*Id.* Vol. I, at 305.) Most likely, this meeting was Gutierrez's reported interview. Quintanilla also testified that she left several messages for Lewis but they were never returned. (*Id.*)

[27] This is evident from the testimony elicited from the witnesses at trial and from the notes Lewis made during the interviews.

order a single document useful as mitigating evidence. Finally, the attorneys cannot recall having asked Valdez any questions about his upbringing or family life, and it appears they did not in fact ask any such questions since they learned nothing about it.

The State contends that the attorneys should not be faulted for failing to find the evidence of mental retardation (i.e., the Wechsler test scores in his school and Hockley County records) since they had no reason to believe Valdez might be mentally retarded, (Evid. Hrg. Trans. Vol. I, at 61; *id.* Vol. III, at 96), and consequently had no reason to affirmatively search for evidence of mental retardation. Basically, this argument is flawed because it ignores the fact that the attorneys did not conduct even the preliminary investigation required by *Nealy, supra.* If they had conducted a minimal investigation into Valdez's background, the attorneys would have discovered many "red flags" suggesting mental retardation, in addition to the one red flag that they did discover, namely, that Valdez had dropped out of school at an early age. (Evid. Hrg. Trans. Vol. I, at 56.) These red flags include the following facts:[28] Valdez was placed in special education, he had a history of drug and alcohol abuse from an early age, he was physically abused as child, and he had been evaluated by a psychologist as a youth. Further, they could have ascertained other facts suggesting mental retardation: that Valdez never lived on his own, never was able to hold

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[28] Dr. Price, the psychologist expert witness called by Valdez, agreed that these elements were "red flags" suggesting mental retardation. (Evid. Hrg. Trans. Vol. II, at 96-97.)

a steady job, and only performed menial work.[29] (*Id.* Vol. I, at 302, 329-30; *id.* Vol. III, at 159.) Notably, it appears that it was precisely such a preliminary investigation that prompted Valdez's court-appointed attorney to seek a mental examination of Valdez when he was arrested for car theft in Hockley County in 1974. The circumstances surrounding Valdez's bungled commission of his prior forgeries and thefts were similarly telling, (*id.* Vol. II, at 117), as was Valdez's insistence on presenting an alibi defense that both Lewis and Gutierrez found to be illogical and unbelievable, (*id.* Vol. III, at 77.) In sum, it was the attorneys' own fault of failing to do a basic background investigation that led directly to their failure to request the state court records, to obtain the school records, or to even ask a few specific questions about Valdez from their client or his family.

Thus, if the attorneys had performed even minimal pretrial interviews, they would have had reason to believe that Valdez might be mentally retarded. When counsel is on notice of a potential mitigating factor, counsel must make a more thorough and independent investigation into the defendant's background for substantiating evidence. *Ransom v. Johnson,* 126 F.3d 716, 723 (5th Cir.1997) ("When counsel is on notice of potential mitigating factors, counsel is no longer justified in relying exclusively on the defendant for information")[30]; *see also Mauldin v.*

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[29] When not in jail, Valdez has worked primarily doing temporary work on construction sites. Testimony suggested that Valdez also sometimes worked as a drug courier or "mule." Within prison, Valdez now works folding clothes.

[30] Although the *Ransom* court ultimately found that the petitioner had not suffered prejudice due to his counsel's failure to discover evidence of his abuse as a child, that court suggested that his counsel's

(Continued on following page)

*Wainwright,* 723 F.2d 799, 800 (11th Cir.1984) (imposing an affirmative duty on counsel to obtain petitioner's medical records where counsel had reason to believe that petitioner's best defense would rest on mitigating evidence of alcoholism). While the Court agrees with the state habeas court that Lewis was not required to obtain Valdez's school records (and the Wechsler score) simply because he learned that Valdez had dropped out of school, it is also true that, had the attorneys done a *minimal* pretrial investigation, they would have been on notice that Valdez might be mentally retarded; consequently, the attorneys did have a duty to look at those school records. For the same reason, they had a duty to obtain full sets of Valdez's prison records and to direct specific questions about Valdez's background to Valdez and his family.[31] If the attorneys had taken any of these steps, they would have learned that Valdez had been tested as mildly mentally retarded by a certified examiner and that strong evidence of mental retardation could be presented in mitigation.[32]

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conduct had been unconstitutionally deficient since counsel had some knowledge of the petitioner's family life and therefore had some reason to search for evidence of child abuse. *Id.*

[31] Also, it appears that, since Lewis had questions about the Hockley County conviction, (Trial Trans. Vol. XIII at 3-6), he had an independent reason to seek the entire record of that particular conviction.

[32] Habeas petitions which allege that counsel was ineffective for failing to properly investigate frequently turn on whether or not counsel can explain why a strategic decision foreclosed the apparent need to investigate a certain type of evidence. Notably, the State can make no assertion that the attorneys' failure to make the preliminary interviews was a strategic decision; rather, since the most promising strategy was clearly to work on the case for mitigation, there was a premium on conducting a background investigation.

With respect to the evidence of mental retardation, the State presents an argument based on the fact that, within the penitentiary packets in Lewis' possession, there were four "Social Criminal History Reports" prepared by the Texas Department of Corrections in 1974, 1978, 1981, and 1983, which indicated that Valdez had an I.Q. of 88, 95, 96, and 87, respectively. (Evid. Hrg. Trans. Vol. I, at 142-50.) In essence, the State contends that the attorneys reasonably relied upon those statements regarding Valdez's I.Q., and, in reliance on those statements, they decided that Valdez was not mentally retarded and also affirmatively decided not to make further inquiry into his background and mental condition.

Assuming, arguendo, that Lewis and Gutierrez both read the penitentiary packets thoroughly and thus saw these I.Q. reports, this argument still fails for several reasons. First, even if Valdez was not mentally retarded, the attorneys had a duty to make a minimal pretrial investigation into his background, and, as explained above, the "red flags" discovered in that investigation should have led them to suspect either that Valdez was mentally retarded or that, at the very least, there might be evidence of a mental condition in his school or prison records. Second, when counsel has a reason to believe there may be available mitigating evidence of a mental defect (as the attorneys here would have had if they had conducted a minimal pretrial investigation), counsel is not absolved of the duty to seek evidence of that mental defect due to the simple fact that there exists some contrary medical evidence. *Profitt v. Waldron,* 831 F.2d 1245, 1249 (5th Cir.1987). Thus, the existence of the apparently normal I.Q. scores in the penitentiary packets did not

relieve the attorneys of their duty to investigate Valdez's background and his mental condition.

Valdez also asserts that his attorneys failed in their duty to investigate by failing to discover evidence that he was abused as a child, that he had many redeeming, humanizing qualities, and that his prior convictions might show a bumbling thief rather than a violent criminal. As the Supreme Court announced in *Penry v. Lynaugh,* 492 U.S. 302, 316, 109 S.Ct. 2934, 2945, 106 L.Ed.2d 256 (1989): "[I]n capital cases the fundamental respect for humanity underlying the Eight Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*quoting Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)). This Court has already determined that the attorneys should have discovered the fact of child abuse by doing the requisite, minimal pretrial interviews with Valdez and potential witnesses. Any mitigating personal attributes could have been discovered through the same, obvious means. With respect to the evidence of the nature of his prior crimes, the attorneys had a duty to at least inquire into the circumstances of those crimes since the State had indicated that it was going to use evidence of those prior convictions at the sentencing phase. *Moore,* 185 F.3d 244, 273-74. In failing to emphasize the evidence on record that Valdez had a non-violent criminal past, counsels' performance was unreasonably deficient. *Cf. id.* at 261 (finding ineffective assistance where counsel failed to respond to prosecution's misleading characterization of defendant's criminal record).

Finally, Valdez asserts that his attorneys failed to learn or develop that he was a model prisoner while awaiting his capital trial. With respect to the "model prisoner" evidence, Lewis testified that he knew that Valdez had a clean record while being held for the capital trial, (Evid. Hrg. Vol. I, at 76-77), but believed that such evidence would not be worth much as mitigation, (*id.* at 78-80). Lewis also stated he was afraid that, since the case involved the shooting of a police officer, other law enforcement officers would have been reluctant to testify as to Valdez's clean prison record. (*Id.* at 128-29.) At the 1990 and 1999 evidentiary hearings, Valdez presented testimony of the jail supervisor who would have testified at trial that Valdez was a "model prisoner" when held in jail before his trial. (Evid. Hrg. Trans. Vol. I, at 264, 267.) At the 1990 evidentiary hearing, one of the supervisor's subordinates testified that Valdez was a "normal inmate" but not a "model prisoner" because he had incurred a few minor infractions. (State Habeas Hrg. Vol. II, at 387-88.)

"Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 104 S.Ct. at 2066. Here, the attorneys did not investigate whether or not there was a witness who would give favorable testimony regarding Valdez's behavior as an inmate in the county jail. Thus, the question is whether the attorneys made a reasonable professional judgment to refrain from looking for a witness who was willing to testify as to the truth of the matter – i.e., that Valdez had a clean record in the jail. There are three factors which the Court should

consider in the circumstances: (1) this evidence would be of primary importance in making a showing that Valdez did not pose a threat of future dangerousness to a prison population, (2) the attorneys did not spend time collecting any other mitigating evidence, and (3) documentary evidence of his clean record most likely existed. Given these considerations, it was unreasonable for the attorneys to decide not to seek a witness to testify on Valdez's behalf.[33] Indeed, as the Supreme Court noted in *Skipper,* the testimony of disinterested witnesses with "no particular reason to be favorably predisposed towards one of their charges . . . would quite naturally be given greater weight by the jury."[34] 476 U.S. at 8, 106 S.Ct. at 1673. At the very least, the attorneys could have obtained jail records reflecting Valdez's obedience since those records could not vacillate at trial. This Court refuses to condone such an injudicious and uninformed decision on the part of counsel merely "parading under the umbrella of strategy." *Moore,* 185 F.3d 244, 261.

Nor was counsel's failure to thoroughly investigate and present mitigating evidence born of some tactical fear of "opening the door" to evidence of prior bad conduct or criminal convictions. First, counsel never reached the threshold level of investigation that would have produced

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[33] Dr. Price, Valdez's expert psychologist, noted that people who are mentally impaired, like Valdez, do best in a highly structured environment, such as prison. (Evid. Hrg. Trans. Vol. II, at 121-22.) Thus, it is likely that counsel's failure to discover Valdez's mental infirmities reinforced their already questionable decision not to investigate his prison behavior.

[34] Lewis admitted at the evidentiary hearing that, at the time of trial, he was not aware of the *Skipper* case nor the rule announced therein. (Evid. Hrg. Trans. Vol. I, at 75.)

an informed decision not to use mitigating evidence because of its potentially prejudicial backlash. Moreover, by the time counsel put on their "case" in the sentencing phase, the State itself had already opened the door to a complete history of Valdez's most significant prior felony convictions and his most recent acts of theft and burglary.[35] Thus, rather than giving the State some golden opportunity for impeachment that it otherwise would not have had, the evidence of Valdez's mental retardation, good prison record, and redeeming human qualities would have strongly mitigated or refuted the damaging evidence that the jury had already heard. (Evid. Hrg. Trans. Vol. I, at 219-32.) Finally, Lewis admitted at the evidentiary hearing that he would have used the available evidence of mental retardation and redeeming personal attributes had he only known of such evidence, (*id.* Vol. I, at 55, 88), while Gutierrez stated that he and Lewis "weren't concerned" about backlash from presenting evidence of Valdez's mental condition, (*id.* Vol. III, at 121-22). There was simply no conceivable strategic reason for not investigating and presenting any of this mitigation evidence.

Valdez also contends that his attorneys failed to conduct a reasonably effective voir dire of potential jurors. As Wayne Huff, Valdez's legal expert, testified at the state

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[35] Also, the jury received the four "normal" I.Q. scores as part of Valdez's "pen pack." No effort was made by defense counsel to impeach these scores; in fact, neither Lewis or Gutierrez knew how these scores were obtained. (Evid. Hrg. Trans. Vol. I, at 152; *id.* Vol. III, at 160-61.) At the 1999 hearing, expert testimony supported the assumption that Texas Department of Corrections probably arrived at those scores by administering the Beta II test. (*Id.* Vol. II, at 23-26.) The Beta II test, which is administered in fifteen minutes in a group setting, is universally held to be much inferior to the Wechsler exam, such as those taken by Valdez as an adolescent. (*Id.* Vol. II, at 28-36, 109-12.)

habeas proceeding, competent capital defense lawyers try to develop a sentencing strategy well before voir dire to allow them to question potential jurors about mitigating evidence that will be offered in the sentencing phase. (Evid. Hrg. Trans. Vol. I, at 197-99.) In this case, however, the voir dire alone demonstrates that Valdez's counsel had not developed such a strategy. Counsel categorically failed to ask the prospective jurors any questions about their feelings regarding mitigating evidence, their ability to distinguish guilt from the special issues relating to deliberateness and future dangerousness, the use of psychiatric evidence and testimony, or any other matters pertinent to the sentencing phase. (*Id.* at 209-11.) Given the strength of the State's case in the guilt/innocence phase, the need to prepare for the sentencing phase was all the more critical. (*Id.* at 210-11.) Thus, the absence of a sentencing strategy adversely affected the voir dire.

Lastly, Valdez asserts that Lewis's closing argument at the sentencing phase was deficient. In less than nine pages of trial transcript, counsel gave a vague and abstract discourse on the definitions of words in the special jury questions, (Trial Trans. Vol. XIII at 122-23), the greater destiny of civilization, (*id.* at 123-25, 130), the non-deterrent effects of war, (*id.* at 125), and his appreciation for Officer Bock, (*id.* at 126). Finally, almost as an afterthought, counsel got around to discussing whether Valdez "will" or "won't . . . commit anything else." (*Id.* at 127-29.) Counsel failed to make a clear and compelling case for why the mitigating factors outweighed the aggravating factors, and thus why the jury should not apply the death penalty. This resulted in an ineffective closing argument.

In sum, the defense attorneys spent a combined total of just 59 hours preparing for all aspects of the case.

Before trial, they spent a total of about 45 minutes talking with Valdez's family, and about 11 hours visiting Valdez. They failed to return calls from potential mitigation witnesses, and, when they did speak with Valdez and his family, they failed to ask pertinent questions. They failed to subpoena or order a single document in a search for mitigating evidence. They failed to pre-arrange for the testimony of a single mitigation witness. Their extemporaneous interviews of those persons on-hand at the trial was so superficial that the attorneys failed to elicit any mitigation evidence about Valdez' background at the sentencing phase.

In light of the facts discussed above, the Court FINDS that defense counsel's performance in representing Valdez in the sentencing phase was deficient because it fell outside the wide range of professionally competent assistance, and because it did not meet an objective standard of reasonableness.[36]

### 2. Prejudice to Valdez

Valdez contends that, not only were his attorneys deficient, but that their deficient investigation and presentation resulted in prejudice to him at the sentencing phase. He asserts that, if the attorneys had made an adequate investigation, had presented at the sentencing phase the evidence found in that investigation, and had

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[36] To the credit of the attorneys, they were both relatively inexperienced in 1987. Lewis acknowledged that he could have done a better job and that, if he had followed his current routine practice, he would have made the kind of investigation which the Court has now found reasonable in the circumstances.

otherwise performed in a competent fashion throughout the trial, then he would have been sentenced to life rather than death. The State argues that there was no substantial prejudice to Valdez.

"Even if a defendant shows that particular errors of counsel were unreasonable, . . . the defendant must show that they actually had an adverse effect on the defense." *Strickland,* 466 U.S. 668, 104 S.Ct. at 2067. The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In particular, when a habeas petitioner challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069. In making this determination, the habeas court is to consider "the totality of the evidence before the judge or jury." *Id.*

Basically, the question for the Court is whether there is a reasonable probability that Valdez's jury, upon seeing the mitigating evidence that the attorneys should have gathered and presented, would have concluded that "the balance of the aggravating and mitigating circumstances did not warrant death." *Id.* For example, in *Loyd v. Whitley,* 977 F.2d 149 (5th Cir.1992), *cert. denied,* 508 U.S. 911, 113 S.Ct. 2343, 124 L.Ed.2d 253 (1993), the defendant was convicted to death for having abducted, raped, and drowned a three-year-old girl. His attorneys failed to present to the jury evidence that the defendant suffered from a mental disease or defect. Given that it was the

jury's role to evaluate the mental condition of the defendant and to consider it as a mitigating factor to the horrific crime committed, the Fifth Circuit found that the absence of the evidence of mental defect was prejudicial to the defendant and granted the writ. *Id.* at 160. More recently, in *Moore v. Johnson,* 185 F.3d 244, 261 (5th Cir.1999), defense counsel neglected to put on evidence of defendant's physical and emotional abuse as a child, his expulsion from the family home at age 14 (to contextualize his subsequent adoption of a life of crime), his school records showing developmental delays, and psychological tests establishing his mental impairment. *Id.* at 270-71. Based on this error, compounded by counsel's failure to present an earlier confession alleging mistake, to highlight defendant's early release from prison on another count, and to respond to misleading statements by the prosecutor as to defendant's conviction record, the Fifth Circuit granted the writ. *Id.* at 277-79. Similarly, in *Armstrong v. Dugger,* 833 F.2d 1430 (11th Cir.1987), defense counsel failed to present at sentencing evidence that defendant had been raised in poverty without adequate adult supervision and that he was mentally retarded; the court found that counsel's failure to present this evidence at sentencing caused sufficient prejudice to defendant to warrant the grant of the writ. *Id.* at 1433-34.

Notwithstanding the brutal and senseless nature of the killing itself, the State's evidence of maliciousness and future dangerousness was weak compared to most capital cases. This tragic act of violence appears to have been conceived and completed within a matter of seconds, immediately following a high-speed car chase and a struggle with Bock. Few of the aggravating circumstances that would typically warrant a death sentence were

present. (*See, e.g., Loyd, supra.*) Meanwhile, the omitted mitigation evidence was strong. The mental retardation evidence was significant by itself;[37] also, as applied to these particular circumstances, it would have tended to explain Valdez's panic during the incident and his alibi at trial. Further, the evidence of child abuse, gentle character, good prison behavior, and non-violence as a criminal would have strongly fortified the case for mitigation. Finally, the inadequate questioning at voir dire and Lewis's closing argument both served to undermine Valdez's case at sentencing.

Thus, the Court FINDS that there is a reasonable probability that the jury, upon seeing the balance of the aggravating and mitigating circumstances, would have refused to affirmatively answer the Texas special interrogatories which mandated the death penalty.

## *V. CONCLUSION*

For the foregoing reasons, the Court FINDS that Valdez's counsel rendered ineffective assistance to Valdez by failing to make a reasonable investigation into his background and that this failure resulted in substantial prejudice to Valdez at the sentencing phase of his trial. Accordingly, the Court FINDS that Valdez's Sixth Amendment right to effective assistance of counsel was violated with respect to the sentencing phase of his trial. The State

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[37] In 1988, at the time Valdez was sentenced, the Public Policy Resources Laboratory of Texas A & M University conducted a poll of Texas residents and determined that, while 86% were in favor of capital punishment, only 11% were in favor of allowing the execution of mentally retarded convicts. (State Habeas Hrg. Vol. II, at 343-44.)

is hereby ORDERED, within the next 90 days, either to: (1) conduct a new trial on the issue of sentencing only, as permitted by Tex.Code Crim.Proc. art. 44.29(c); or (2) vacate Petitioner's sentence and impose a sentence less than death.

**Alberto VALDEZ, Petitioner-Appellee,**

**v.**

**Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellant.**

**No. 99-41216.**

United States Court of Appeals,
Fifth Circuit.

April 2, 2002.

Jeffrey Scott Levinger (argued), Carrington, Coleman, Sloman & Blumenthal, Dallas, TX, William David Underwood (argued), Waco, TX, for Petitioner-Appellee.

Gregory Scott Coleman (argued), Lisa Royce Eskow, Meredith Bishop Parenti, Austin, TX, for Respondent-Appellant.

Appeals from the United States District Court for the Southern District of Texas; Janis Graham Jack, Judge.

*ON PETITION FOR PANEL REHEARING*

(Opinion Dec. 3, 2001, 5th Cir., 2001, 274 F.3d 941)

Before DAVIS, EMILIO M. GARZA and DENNIS, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

The petition for panel rehearing is DENIED. In denying rehearing, the panel believes that the opinion properly holds that the district court abused its discretion when it excluded four exhibits relevant to the issue of whether Valdez's counsel were ineffective for not investigating and presenting evidence at sentencing of his alleged

mental retardation. As the opinion states, the exhibits are relevant because they existed at the time of the 1988 trial and undercut Valdez's assertion that he is mentally retarded. Moreover, to the extent that the district court excluded the exhibits as a sanction for alleged discovery violations in prior state court proceedings, the panel still believes that the district court abused its discretion. Although, as the dissent notes, there are many cases supporting a district court's discretion to fashion appropriate sanctions for failing to comply with the Federal Rules of Civil Procedure and pretrial orders, those facts are not present here. Valdez is not objecting to the Director's failure to comply with an order issued by the district court in his federal habeas proceeding. Rather, Valdez is objecting on the ground that the State failed to comply with discovery requests in earlier proceedings in state court. Finally, the panel notes that Valdez has not shown that the State's failure to produce these exhibits sooner prejudiced him. The exhibits at issue indicate that Valdez was *not* mentally retarded. Consequently, the State's failure to introduce them at Valdez's earlier capital murder trial and state habeas hearing actually worked to Valdez's advantage.

DENNIS, Circuit Judge, dissenting from the denial of panel rehearing:

In his petition for panel rehearing, Alberto Valdez requests that the panel opinion be amended to affirm the district court's exclusion of four exhibits from his federal evidentiary hearing. The panel opinion correctly states that we review evidentiary rulings for abuse of discretion and that an erroneous evidentiary ruling will be reversed only where a substantial right of a party is affected. *See Valdez v. Cockrell,* 274 F.3d 941, 957 (5th Cir.2001). But,

for the reasons that follow, I do not see how the district court's exclusion of the four exhibits at issue constitutes an abuse of discretion.

First, the exclusion of evidence is a recognized sanction or remedy for discovery violations. *See* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.6(a) (2d ed.1999). The 1990 subpoena issued during the state habeas proceeding obligated the Director to produce the four exhibits. Because the Director did not comply until the first day of the federal evidentiary hearing – several years later – I find it impossible to conclude that the district court abused its discretion in excluding the exhibits. Indeed, a district court may abuse its discretion by *admitting* testimony or documents that a proponent fails to timely identify or produce when under a legal obligation to do so. *See, e.g., Campbell v. Keystone Aerial Surveys, Inc.,* 138 F.3d 996 (5th Cir.1998). Moreover, had the State produced the exhibits prior to Valdez's murder trial in response to his trial counsel's discovery request, the issue of mental retardation may have been investigated and presented to the jury during the penalty phase of the trial. Thus, questions of relevancy notwithstanding, the district court could conclude, without abusing its discretion, that the State waived the opportunity to present the exhibits by failing to produce them in a timely manner. By overturning the district court's decision regarding the exhibits, the panel opinion rewards the State for failing to do what it should have done over a decade ago.

Second, I also find that the district court's exclusion of the exhibits as irrelevant was within its sound discretion. Although the panel opinion relies on the *existence* of these documents prior to Valdez's trial and habeas hearing, *Strickland* asks whether there is a reasonable probability

that, but for counsel's failure to investigate Valdez's possible retardation, the result of the *1988 trial* would have been different. *See Strickland v. Washington,* 466 U.S. 668, 694-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Evidence for which the Director cannot establish availability at that time is not relevant to the *Strickland* inquiry. Because the Director failed to demonstrate the relevancy of the exhibits, the district court did not abuse its discretion in excluding them. *See United States v. McClatchy,* 249 F.3d 348, 358 (5th Cir.2001). Because the district court did not err, inquiry into the substantial rights of the Director is unnecessary.

The panel majority's review of the district court's ruling on the exhibits seems far closer to *de novo* than it does to abuse of discretion, which may unfortunately reflect my colleagues' opinion as to the ultimate merits of this case. The district court did not abuse its discretion; accordingly, I dissent from the denial of panel rehearing.

**Alberto VALDEZ, Petitioner-Appellee,**

**v.**

**Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellant.**

**No. 99-41216.**

United States Court of Appeals,
Fifth Circuit.

April 12, 2002.

Jeffrey Scott Levinger, Carrington, Coleman, Sloman & Blumenthal, Dallas, TX, William David Underwood, Waco, TX, for Petitioner-Appellee.

Gregory Scott Coleman, Lisa Royce Eskow, Meredith Bishop Parenti, Asst. Sol. Gen., Austin, TX, for Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Texas; Janis Graham Jack, Judge.

*ON PETITION FOR REHEARING EN BANC*

(Opinion Dec. 3, 2001, 5th Cir., 2001, 274 F.3d 941)

Before DAVIS, EMILIO M. GARZA and DENNIS, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

DENNIS, Circuit Judge, joined by WIENER, DeMOSS and PARKER, Circuit Judges, dissenting from the denial of the Petition for Rehearing En Banc:

Before the court is a panel opinion holding that a full and fair hearing in state court is not a prerequisite to the application of 28 U.S.C. § 2254's "deferential scheme."[1] Because this interpretation of the AEDPA precludes meaningful review of state court decisions rendered in a procedurally defective manner, this case merits the full attention of this court. Therefore, I respectfully dissent from the denial of rehearing en banc.

The parties present a habeas court with opposing views or *beliefs* concerning the underlying facts and procedural process that resulted in a criminal conviction. But the only way for the habeas court to *know* what went on at trial is to read the transcript. Review of the record is particularly important when the habeas judge did not preside over the criminal trial. The state habeas judge in Alberto Valdez's case was not the trial judge, and he admitted, in cavalier fashion, that he was not familiar with the record: "I have never read the record of the trial and I don't intend to. I don't have the time."[2] Nevertheless, the state habeas court issued findings of fact and conclusions of law denying Valdez relief.

Valdez later filed a federal habeas petition, and the district court granted relief on his ineffective assistance of counsel claim. The district court was certainly aware of the AEDPA and the respect that it bestows on a state

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[1] *See Valdez v. Cockrell*, 274 F.3d 941, 950-51 (5th Cir.2001).

[2] *Valdez v. Johnson*, 93 F.Supp.2d 769, 776 (S.D.Tex.1999) (quoting State Hrg. on Prop. Find. & Concl. Law, 144-45).

habeas court's adjudication on the merits. It also recognized, however, that the state habeas judge's failure to read the record denied Valdez a full and fair hearing on a federal constitutional claim. The court therefore found that § 2254(e)(1)'s presumption of correctness and § 2254(d)'s standards of review were largely inapplicable. In reaching this conclusion, the court relied on the Supreme Court's decision in *Townsend v. Sain*[3] and the Tenth Circuit's opinion in *Miller v. Champion*.[4] In *Townsend*, the Court held that a federal evidentiary hearing is mandatory if the habeas applicant did not receive a full and fair hearing in state court.[5] In a mandatory federal evidentiary hearing, "it is the federal judge's duty to disregard the state findings. . . . "[6] The *Miller* court observed, in a post-AEDPA case, that the denial of a full and fair hearing in state court still renders inoperative the statutory presumption of correctness:

> [Although] [f]ederal courts entertaining habeas petitions must give a presumption of correctness to state courts' factual findings, . . . [t]his presumption of correctness does not apply . . . if the habeas petitioner did not receive a full, fair, and adequate hearing in the state court proceeding on the matter sought to be raised in the habeas petition.[7]

Today, a majority of this court takes a different approach from our sister circuit and again disregards the

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[3] 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

[4] 161 F.3d 1249 (10th Cir.1998).

[5] *See Townsend*, 372 U.S. at 312-13, 83 S.Ct. 745.

[6] *Id.* at 316, 83 S.Ct. 745.

[7] *Miller*, 161 F.3d at 1254 (internal quotation and citation omitted).

Supreme Court's warnings against interpreting the AEDPA in a manner that produces "far-reaching and seemingly perverse" implications for habeas practice.[8] The panel opinion insulates a state habeas court's decision on a federal ineffective assistance of counsel claim, which is highly fact specific, from meaningful review in a federal habeas court without regard to the quality of the state court's fact-finding procedure. But if a full and fair hearing is not a prerequisite to a state-court adjudication on the merits that is entitled to deference in federal court under the AEDPA, then state courts are free to (1) rubber-stamp the prosecuting body's proposed findings of fact and conclusions of law, (2) deny the petitioner relief without affording him a hearing, and (3) effectively prevent a federal court from later granting the requested relief. I do not believe that the AEDPA left the Great Writ so impotent.[9] According to one leading scholar:

> A change of that kind would be dramatic and not something that anyone would lightly read into the [AEDPA]. . . . One can imagine that, in some circumstances at least, serious constitutional

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[8] *Stewart v. Martinez-Villareal,* 523 U.S. 637, 644, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998). The Supreme Court recently rejected a Fifth Circuit interpretation of the AEDPA in favor of a more stringent habeas review of state court decisions. *See Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (rejecting the "reasonable jurists" standard adopted by this court in *Drinkard v. Johnson,* 97 F.3d 751, 769 (5th Cir.1996), in favor of an "objectively unreasonable" standard). *See also Max-George v. Reno,* 205 F.3d 194 (5th Cir.2000), *overruled by INS v. St. Cyr,* 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

[9] *See Miller,* 161 F.3d at 1254 ("[B]ecause the state court did not hold any evidentiary hearing, we are in the same position to evaluate the factual record as it was. Accordingly, to the extent the state court's dismissal of Mr. Miller's petition was based on its own factual findings, we need not afford those findings any deference.").

> questions would be raised by a rule that requires a federal court to accept a factual finding made in state court, with no written statement of the finding on which to focus and with no ability to assess the process out of which that finding emerged and the evidence on which it was based.
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> . . . .
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> I read § 2254(e)(1) to drop the specific procedural and substantive standards contained in the former § 2254(d). But I do not read it to dispense with a federal court's rudimentary responsibility to ensure that it is deciding a constitutional claim based on factual findings that were forged in a procedurally adequate way and were anchored in a sufficient evidentiary record. In this sense, § 2254(e)(1) departs from prior law, but only to substitute general notions of procedural regularity and substantive accuracy for detailed statutory standards.[10]

The AEDPA repealed former § 2254(d) and replaced it with two new provisions dealing with state court fact-findings and fact-finding procedures, 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1). A United States district court has the authority to grant a writ of habeas corpus where the state-court adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[11] But this authority must be interpreted in relation to the congressional directives that "a determination

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[10] Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 140-41 (1996).

[11] 28 U.S.C. § 2254(d)(2).

of a factual issue made by a State court shall be presumed to be correct," and that a habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."[12] In my dissent from the panel majority's opinion, I stated that § 2254(d)(2) and § 2254(e)(1) must be read *in pari materia*.[13] Doing so leads to the conclusion that the " 'determination[s] of a factual issue made by a State court' that section 2254(e)(1) tells courts to 'presume[ ] to be correct' are only those determinations that survive section 2254(d)(2)'s winnowing out of '*unreasonable* determination[s].' "[14] The panel majority, however, found what it considered to be "an easier way to harmonize § 2254(d)(2) and § 2254(e)(1)" and offered the following example:

> [A] district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. *See* § 2254(e)(1). It is then a separate question whether the state court's determination of facts was unreasonable in light of the evidence presented in the state court proceeding. *See* § 2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).[15]

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[12] 28 U.S.C. § 2254(e)(1).

[13] *See Valdez v. Cockrell*, 274 F.3d 941, 968 (5th Cir.2001) (Dennis, J., dissenting).

[14] 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 20.2c, at 826 (4th ed.2001).

[15] *Valdez v. Cockrell*, 274 F.3d at 951 n. 17.

This explanation makes sense in cases where the petitioner received a full and fair hearing in state court. If the state court does not afford such a hearing, a federal evidentiary hearing is mandatory under *Townsend*.[16] It is here that the panel majority's explanation places the district judges in this circuit in a difficult position by requiring a district court, after spending time and energy conducting an evidentiary hearing, to disregard the evidence developed before it and instead give deference to a state-court decision made through defective process or on an incomplete record. This court would achieve better results if it recognized that the denial of a full and fair hearing in state court produces *per se* "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[17] Such a *per se* rule would be fully consistent with the text of the AEDPA.[18] Moreover, it would continue a consistent theme in our jurisprudence recognizing that we defer to a state habeas court so long as it delivers a real decision on the merits based on a procedurally reasonable determination of the facts.[19] Finally, it would avoid the serious constitutional

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[16] *See, e.g., Hughes v. Johnson,* 191 F.3d 607, 630 (5th Cir.1999).

[17] 28 U.S.C. § 2254(d)(2).

[18] *See* 1 HERTZ & LIEBMAN, *supra* note 14, § 20.2c, at 825-31.

[19] *See Morris v. Cain,* 186 F.3d 581, 584 (5th Cir.1999) ("A full and fair adjudication of a petitioner's claims in state court is a prerequisite for application of AEDPA's review provisions."); *Corwin v. Johnson,* 150 F.3d 467, 471 (5th Cir.1998) ("In this Circuit, provided the state court conducted a full and fair adjudication of the petitioner's claims, pure questions of law and mixed questions of law and fact are reviewed under § 2254(d)(1), and questions of fact are reviewed under § 2254(d)(2).").

questions raised by the panel majority's interpretation of the AEDPA.[20]

WIENER and PARKER, Circuit Judges, join DENNIS, Circuit Judge's dissent and write separately to add the following:

The crux of the majority's opinion is that application of the AEDPA's deference scheme swings on whether the state *habeas* court reached an "adjudication on the merits." The majority's "logic" simplistically reasons that (1) anything – everything – that is not "procedural" is automatically "substantive"; (2) any ruling that is "substantive" is an "adjudication on the merits"; *ergo,* (3) any non-procedural ruling is an adjudication on the merits and is immunized from federal *habeas* review under the AEDPA's deference scheme. As accepted by the majority, this flawed syllogism eviscerates meaningful federal *habeas* review of a state court's flaunting abdication of its duty to apply "the law of th[e Supreme] Court to the facts of a prisoner's case." *Valdez,* 274 F.3d at 946-47. When, as here, the state *habeas* judge delays a determination for six years of inaction between two perfunctory hearings, loses the exhibits in the meantime, and announces that he is too busy to acquaint himself with the case by reading the trial transcript, we cannot credit that judge's putting pen to paper and rubberstamping the state's proposed findings as being an "adjudication on the merits." If this court's level of deference extends to what happened in this case, then federal *habeas* review has been reduced to nothing more than a search for the state judge's signature – a classic example of exalting form over substance.

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[20] *See supra* text accompanying note 10.

DeMOSS, Circuit Judge, joins in DENNIS, Circuit Judge's dissent for the reasons stated therein and for the additional reason that the only reason this habeas matter is under AEDPA is the ineptitude of the state habeas judge in taking six years to reach a final decision on petitioner's claims.

## U.S. CONST., ARTICLE III, SECTIONS 1 AND 2

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

* * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

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## U.S. CONST., ARTICLE VI, CL. 2

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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## U.S. CONST., AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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### U.S. CONST., AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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### 28 U.S.C. § 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

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**28 U.S.C. § 2254. State custody; remedies in Federal courts.**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) The applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court

shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Supreme Court, U.S.
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No. 02-99

# In the Supreme Court of the United States

ALBERTO VALDEZ,
*Petitioner*,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
*Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## BRIEF IN OPPOSITION

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## BRIEF IN OPPOSITION

The Court should deny the petition for writ of certiorari because the Fifth Circuit correctly held that the AEDPA's deference requirements are not void when a federal court conducts its own evidentiary hearing due to alleged defects in state habeas proceedings. Additionally, the procedural posture of this case makes it an inappropriate candidate for review because the Fifth Circuit did not reach the merits of Petitioner's habeas claims but remanded the case to the district court for reconsideration under the AEDPA's deferential framework. Finally, contrary to Petitioner's assertion, there is no circuit split or unsettled and important question of federal law that warrants the Court's attention. *See* SUP. CT. R. 10(a), (c). Accordingly, the Court should deny the petition for writ of certiorari.

## STATEMENT OF THE CASE

Alberto Valdez murdered a sergeant of the Corpus Christi, Texas Police Department during a traffic stop. On September 9, 1987, Sergeant J.D. Bock was issuing a traffic citation when a large beige car driven by Valdez passed at a high rate of speed. When Valdez failed to stop as directed, Bock returned to his patrol car, turned on the lights and siren, and chased Valdez's vehicle. Bock eventually pulled Valdez over when the beige vehicle blew a tire. Bock's final radio transmission stated that Valdez's vehicle had been stopped.

A witness, Jerry Lee Wittner, had attempted to follow the police car but lost sight of it for approximately 30 seconds. While Wittner was pulling up, Valdez wrestled Sergeant Bock's service revolver away and shot Bock in the chest. Wittner saw Valdez and Bock wrestling, heard the shot, and saw Bock bend over and fall down. Valdez shot Bock again as Wittner ran back to his truck, fired at Wittner as he started to drive away, and then shot Bock twice more. In all, Valdez shot Bock twice in the chest and twice in the head.

After fleeing the scene in his car, Valdez fired on another police officer giving chase. That officer followed Valdez's vehicle down

an isolated country road. Valdez turned into the driveway of a small farmhouse, ran inside, and hid Sergeant Bock's revolver under some couch cushions. Ultimately, police apprehended Valdez lying in a grassy area of a field behind the farmhouse.

At trial, Valdez testified at length about his primary defense: a passenger in his car, unseen by any of the witnesses to the crime and known only as "Chico," shot Sergeant Bock with a .38 special. This lengthy testimony, which provided the jury a first-hand opportunity to hear and observe Valdez, was full of unexplained inconsistencies, and the jury rejected it. Valdez was convicted of capital murder and given a sentence of death in connection with Sergeant Bock's shooting.

The Texas Court of Criminal Appeals affirmed the conviction. *Valdez v. State*, 776 S.W.2d 162 (Tex. Crim. App. 1989) (en banc). In its opinion, the court noted that on the day Valdez murdered Sergeant Bock, Valdez had stolen property in his car and a warrant had issued for his arrest due to violations of parole. *Id.*, at 167.[1] Thus, the court, concluded,

> "it is patently obvious appellant was in the course of a crime spree at the time Officer Bock attempted to stop him. In order to preclude apprehension, appellant killed Officer Bock in a cold-blooded, deliberate manner by shooting him twice in the chest at close range and twice in the head." *Id.*

The court further determined that "[t]he evidence is clearly sufficient to support the inference that appellant was a career criminal who would do anything necessary to avoid apprehension." *Id.*

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1. Valdez had five previous felony convictions. *Valdez*, 776 S.W.2d, at 167.

Valdez filed an application for writ of habeas corpus in state court. He alleged, *inter alia*, that his trial counsel rendered ineffective assistance of counsel by failing to investigate and present certain mitigating evidence—namely evidence of mental retardation—during the punishment stage of the trial. The state court conducted a two-day evidentiary hearing on Valdez's claims, with particular focus on his ineffective-assistance-of-counsel claim. The court heard extensive testimony about trial counsel's performance before and during trial. It also admitted, and heard testimony about, various exhibits Valdez alleged should have alerted trial counsel that Valdez might be mentally retarded.

After two days, the hearing was recessed to permit both parties to secure additional witnesses, if necessary. Approximately six years later, on motion of both parties, the evidence was closed. The court then held another hearing, permitting lengthy oral argument on both sides' proposed findings of fact and conclusions of law. At that hearing, the judge indicated that some of the evidentiary hearing exhibits were missing and that he had not read the transcript of Valdez's trial. He stated, however, that he would reread the transcript of the two-day evidentiary hearing—at which exhibits were discussed and Valdez's trial counsel's performance was dissected.[2]

The state habeas court issued 20 pages of findings of fact and conclusions of law that did not merely "rubberstamp" the State's proposed findings and conclusions, as Valdez misrepresents. Resp.

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2. Specifically, the court stated: "Let's go ahead and—I told you up front that I was not going to give you a ruling today. I want to make sure that I go read this habeas corpus hearing again." Tr. 2/28/97, at 144. Valdez's repeated assertions that the state habeas court "never considered," "admittedly and unapologetically refused to consider," and "effectively excluded from consideration" material evidence distorts the proceedings in that court. *See, e.g.*, Pet. i, 3, 5, 17, 28.

App. 1a-18a.[3] For example, the State proposed 10 findings and conclusions on Valdez's ineffective-assistance-of-counsel-claim; but the court included 20 findings of fact and conclusions of law on this issue. Resp. App. 5a-7a. These addressed matters not included in the State's submission, such as the court's determination that Valdez's trial counsel had asked one of the habeas witnesses to testify during the punishment phase, but she declined; and that the testimony of other character witnesses Valdez presented on habeas corpus review duplicated testimony presented at trial on punishment. Resp. App. 6a.[4]

The Texas Court of Criminal Appeals reviewed the state habeas court's findings of fact and conclusions of law and stated that they were supported by the record. Resp. App. 19a. Therefore, that court denied habeas relief. *Id.*

Valdez then filed his federal habeas corpus petition. The district court granted Valdez an evidentiary hearing on his ineffective-assistance-of-counsel claim, determining that the state habeas hearing had not been full and fair because evidence "was improperly (and, apparently, largely accidentally) excluded by the state habeas judge." Pet. App. 86 n.22. Additionally, the district court stated that, even if Valdez was not "entitled" to a hearing on that basis, "it was proper to exercise its discretion to grant one." Pet. App. 82 n.18.

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3. Citations to Respondent's Appendix will be designated "Resp. App. [page #]" and citations to Petitioner's Appendix will be designated "Pet. App. [page #]."

4. Accordingly, Respondent objects to Valdez's misstatement that "rather than review the evidence, the state habeas court simply signed findings of fact and conclusions of law that repeated virtually verbatim the state's proposed findings and conclusions." Pet. 4.

At the hearing, the district court excluded several of Respondent Cockrell's exhibits offered to refute Valdez's claim that his trial counsel was ineffective for failing to investigate whether Valdez is mentally retarded. These included: the results of a Wechsler Adult Intelligence Scale test that was administered during Valdez's 1974 incarceration with the Texas Youth Commission and revealed a verbal I.Q. of 76, a performance I.Q. of 90, and a full scale I.Q. of 81—scores above the classification of mental retardation; the results of a doctor's examination during that same period of incarceration, in which the doctor concluded Valdez was not mentally deficient; and evidence that Valdez passed an eighth grade equivalency test and four out of five sections of the GED in 1986, two years prior to his conviction for murdering Sergeant Bock. *See* Pet. App. 33, 35-36.

Following the evidentiary hearing, the district court granted Valdez's petition for writ of habeas corpus. The court reasoned that, because it conducted an evidentiary hearing, the deference standards required by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) "largely did not apply." Pet. App. 83-84, 86 n.22. The court independently determined that the writ should issue because Valdez's trial counsel provided ineffective assistance of counsel at the sentencing phase of the trial by failing to make an adequate investigation into Valdez's background. Pet. App. 105.

Respondent Cockrell appealed to the Fifth Circuit, which reversed the district court's judgment. The Fifth Circuit assumed, without deciding, that Valdez had not received a full and fair hearing in state court. The court held, however, that the absence of an adequate state-court hearing is not a prerequisite for applying "the AEDPA's deferential framework, as set out in 28 U.S.C. §2254(d) and (e)(1)." Pet. App. 27, 37.

Rather than evaluate the merits of Valdez's ineffective-assistance-of-counsel claim under the AEDPA, the Fifth Circuit remanded the case to the district court. The opinion made clear

that, on remand, the district court need not disregard evidence from its previous hearing. Rather, that evidence could be used to assist the district court in determining whether, applying the correct deference standards under the AEDPA, Valdez established an ineffective-assistance-of-counsel claim that entitled him to habeas relief.

The Fifth Circuit also held that the district court abused its discretion in excluding evidence of Valdez's Wechsler scores and doctor's examination while incarcerated with the Texas Youth Commission, as well as the results of his GED test and eighth grade equivalency exam. The Fifth Circuit directed the district court, on remand, to admit and consider these records, which "tend to contravene Valdez's contention that he is mentally retarded, which bears on whether his trial counsel's performance prejudiced him." Pet. App. 36-37.

## SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari because the Fifth Circuit correctly rejected Valdez's argument that the AEDPA's deference requirements do not apply if a federal court conducts its own evidentiary hearing due to alleged defects in state-court habeas proceedings. The Fifth Circuit's holding properly balances a federal court's decision to conduct an evidentiary hearing with the respect for state-court habeas adjudications required by both the plain text of the AEDPA and this Court's decision in *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000).

Moreover, apart from the correctness of the Fifth Circuit's ruling, the procedural posture of this case renders it an inappropriate candidate for review. The Fifth Circuit did not pass upon the merits of Valdez's ineffective-assistance-of-counsel claim but merely remanded the case to the district court for reconsideration under the AEDPA's deferential framework. Thus, as yet, no lower court has analyzed Valdez's claim under the

AEDPA, and there is no ruling in that respect for this Court to review. Nor, contrary to Valdez's assertion, does the Fifth Circuit's decision implicate a circuit split or an important and unsettled question of federal law that merits attention. *See* SUP. CT. R. 10(a), (c). Finally, the Court should decline to review Valdez's constitutional challenges to the AEDPA, which were not passed upon by the Fifth Circuit and, regardless, are inconsistent with this Court's AEDPA jurisprudence. Accordingly, the Court should deny the petition for writ of certiorari.

## ARGUMENT

### I. THE PROCEDURAL POSTURE OF THIS CASE RENDERS IT AN INAPPROPRIATE CANDIDATE FOR REVIEW.

Although the Fifth Circuit held that the district court erred in concluding that the AEDPA's deference requirements "largely did not apply" when, as here, there is a federal evidentiary hearing, the Fifth Circuit declined to consider the merits of Valdez's ineffective-assistance-of-counsel claim. Pet. App. 13, 32. Rather, the Fifth Circuit remanded the case to the district court for reconsideration under the AEDPA's deferential framework. Pet. App. 32, 37.

At this time, therefore, no federal court has analyzed whether, for example, the state habeas court's adjudication reflects an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. §2254(d)(1)-(2). Nor has a federal court evaluated whether Valdez provided clear and convincing evidence to rebut the presumption of correctness afforded to all of the state habeas court's factual findings—including facts implicit in mixed law and fact conclusions—and not just the select findings of historical fact to which the district court previously limited its deference. *See id.* §2254(e)(1); *see also* Pet. App. 13-14 & n.11.

Without a lower-court decision on these questions, it would be premature for this Court to address Valdez's complaints about

applying the AEDPA's deferential framework when a federal court conducts its own evidentiary hearing. *See Bhd. of Locomotive Fireman & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (explaining, in denying the petition for writ of certiorari, that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *see also Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of the petition for writ of certiorari) (noting that prudence militates against granting the writ to review a judgment remanding a case for further proceedings).

Valdez erroneously protests that the district court, on remand, will be compelled to disregard the federal record and accept the state court's findings and conclusions—rendering the federal evidentiary hearing a futile exercise. *See, e.g.*, Pet. 26.[5] But the Fifth Circuit's opinion makes clear that its remand is neither driven by that purpose, nor should it have that effect. Rather, the federal evidentiary hearing may, for example, "assist the district court in ascertaining whether the state court reached an unreasonable determination under either §2254(d)(1) or (d)(2)." Pet. App. 21. Thus, although a federal evidentiary hearing does not wipe the slate clean and permit a federal court to ignore a state habeas court's two-day evidentiary hearing and issuance of 20 pages of findings of fact and conclusions of law—as Valdez hoped—it can facilitate federal review of the state adjudication underlying a federal petitioner's habeas claims. Consequently, as the Fifth Circuit

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5. Similarly, Valdez's second question presented misleadingly suggests that the Fifth Circuit's decision requires the district court to "disregard its own conclusions" about ineffective assistance of counsel, Pet. i, when, instead, it only precludes the district court from substituting its opinion for that of the state habeas court without first determining if the state court's analysis was unreasonable, as required by the plain text of the AEDPA and this Court's precedent. *See* 28 U.S.C. §2254(d); *Williams*, 529 U.S., at 410-13; *see also infra* Part III.

explained, "[a]n evidentiary hearing is not an exercise in futility just because §§2254(d) and (e)(1) require deference." Pet. App. 21-22.

Regardless, the proper interplay between a federal evidentiary record and the deference requirements in §2254(d) and (e)(1) is best tested through concrete application, not hypothesis. The Court should decline to address Valdez's claims at this procedural juncture. *See Va. Military Inst.*, 508 U.S., at 946; *Bhd. of Locomotive Fireman*, 389 U.S., at 328.

## II. No Circuit Split Warrants the Court's Attention.

Although the Fifth Circuit noted its disagreement with *Miller v. Champion*, 161 F.3d 1249, 1254 (CA10 1998)—in which the Tenth Circuit determined it owed no presumption of correctness to factual findings of a state habeas court that did not conduct an evidentiary hearing—there is no circuit conflict that warrants intervention by this Court.[6]

As the Fifth Circuit explained, the Tenth Circuit made no attempt in *Miller* to construe the AEDPA's deference provisions in §2254(d) and (e)(1). Pet. App. 25. Indeed, the Tenth Circuit did not cite, much less analyze, these statutory requirements in its brief deference discussion—even though the court acknowledged, in general, that Miller's claims were governed by the AEDPA. *Miller*, 161 F.3d, at 1252, 1254.[7] Instead, without elaboration, the Tenth

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6. Notably, the state court in *Miller* did not hold an evidentiary hearing before dismissing Miller's ineffective assistance of counsel claim. 163 F.3d, at 1252, 1254. By contrast, the state habeas court in Valdez's case held a two-day evidentiary hearing on Valdez's ineffective assistance of counsel claim. Pet. App. 2, 5.

7. In the portion of the Tenth Circuit's opinion preceding its deference discussion, the court alluded to §2254(d)(1) but erroneously stated that it required a federal habeas petitioner to prove that "his *conviction*"—as opposed to the state habeas court's adjudication of his

Circuit followed its pre-AEDPA precedent, which excused district courts from affording a presumption of correctness to state-court factual findings if a petitioner did not receive an adequate hearing in state court. *Id.* (quoting *Nguyen v. Reynolds*, 131 F.3d 1340, 1359 (CA10 1997)).[8]

The Fifth Circuit correctly noted that *Miller*'s deference conclusion was based solely on pre-AEDPA precedent and, thus, "the Tenth Circuit did not ground its decision on a reading of the statute." Pet. App. 25. The *Miller* opinion, therefore, offers no reasoning to counter the Fifth Circuit's extensive analysis of the AEDPA's text and the manner in which it alters pre-AEDPA deference. As such, *Miller* creates no conflict with the Fifth Circuit.

Tellingly, *Miller* did not address the question of deference to a state court's application of law to fact, *see* 28 U.S.C. §2254(d)(1), or its determination of facts in light of the evidence presented, *see id.*, §2254(d)(2), because—under the pre-AEDPA precedent *Miller* followed—the only deference standard was the presumption of correctness afforded state-court factual findings now paralleled in §2254(e)(1).[9] Thus, the Tenth Circuit never considered how a

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claim—is contrary to, or involved an unreasonable application of, clearly established federal law. *Miller*, 163 F.3d, at 1253 (emphasis added). That misreading of the AEDPA may explain why the Tenth Circuit failed to recognize that §2254(d)(1) requires reassessment of pre-AEDPA deference precedent and why that court did not even cite §2254(d)(1) in the course of its cursory deference discussion. *See id.*, at 1254.

8. Although the Tenth Circuit decided *Nguyen* after the enactment of the AEDPA, the court applied its pre-AEDPA precedent because Nguyen filed his federal habeas petition prior to the Act's effective date. 131 F.3d, at 1345, 1359.

9. The former §2254(d) required that state-court factual findings be afforded a presumption of correctness, subject to enumerated exceptions.

federal evidentiary hearing conducted to cure alleged defects in a state-court proceeding interacts with §2254(d)'s deference requirements.

By contrast, the Fifth Circuit directly addressed this question and logically reasoned that, for example, a federal evidentiary hearing could "assist the district court in ascertaining whether the state court reached an unreasonable determination under either §2254(d)(1) or (d)(2)." Pet. App. 21. Nothing in *Miller* engages, much less refutes, the statutory-construction analysis conducted by the Fifth Circuit.[10]

In an unsuccessful attempt to suggest a meaningful disagreement between the Fifth and Tenth Circuits, Valdez cites two post-*Miller* Tenth Circuit decisions that also apply the same pre-AEDPA precedent and state that a presumption of correctness does not apply to state-court factual findings absent an adequate state-court hearing. Pet. 12 (citing *Mayes v. Gibson*, 210 F.3d 1284, 1289 (CA10 2000), and *Barnett v. Hargett*, 174 F.3d 1128, 1135-36 (CA10 1999)). But, like *Miller*, these opinions contain no textual or other discussion or analysis of the AEDPA deference

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Pet. App. 15 (quoting former §2254(d)(6)). The AEDPA replaced that factual presumption of correctness with the current presumption in §2254(e)(1) and also created new deference requirements for questions of law and mixed questions of law and fact in §2254(d). *See* 28 U.S.C. §2254(d), (e)(1); Pet. App. 17-18; *see also infra* Part III (discussing the AEDPA's amendment of §2254).

10. The Seventh Circuit has similarly held that §2254(d)(1)'s "standard is applicable even though the district judge held an evidentiary hearing." *Pecoraro v. Walls*, 286 F.3d 489, 443 (CA7 2002) (endorsing the Fifth Circuit's reasoning and noting that although "[t]he evidence obtained in such a hearing is quite likely to bear on the reasonableness of the state courts' adjudication . . . we do not see why it should alter the *standard* of federal review") (emphasis in original).

provisions—particularly §2254(d)(1)-(2). *See Mayes*, 210 F.3d, at 1289; *Barnett*, 174 F.3d, at 1135-36.

As none of the Tenth Circuit decisions offer a statutory construction contrary to that of the Fifth Circuit, Valdez identifies no conflict that warrants intervention by this Court. Valdez's petition, at most, implicates a shallow disagreement between the Fifth and Tenth Circuits. The Court should permit the issue to percolate in the lower courts and wait for a legitimate conflict to emerge before entertaining the tenuous argument that an inadequate state habeas hearing voids the AEDPA's statutory deference scheme.

Finally, Valdez alludes to circuit disagreement over a different AEDPA deference issue that was neither presented to, nor considered by, the Fifth Circuit—whether an "adjudication on the merits" entitled to deference under §2254(d) exists when a state court provides no rationale for its decision (*i.e.*, the opinion fails to identify the petitioner's federal claim or to discuss federal law). Pet. 15.[11] To the extent a conflict on that issue exists, it is irrelevant to Valdez's petition, which does not present that question.[12]

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11. To illustrate disagreement on this issue, Valdez cites *Sellan v. Kuhlman*, 261 F.3d 303 (CA2 2001), *Doan v. Brigano*, 237 F.3d 722 (CA6 2001), *Bell v. Jarvis*, 236 F.3d 149 (CA4 2000) (en banc), *cert. denied*, 122 S.Ct. 74 (2001), *Hameen v. Delaware*, 212 F.3d 226 (CA3 2000), *cert. denied*, 532 U.S. 924 (2001), and *Hennon v. Cooper*, 109 F.3d 330, 335 (CA7 1997). Valdez misrepresents the Sixth Circuit's decision in *Doan*. Pet. 15. Although that court declined to apply §2254(d)(1)'s "unreasonable application" prong to a state-court decision that did not identify a federal claim, the Sixth Circuit did afford deference under §2254(d)(1)'s "contrary to" prong. *Doan*, 237 F.3d, at 730-31.

12. In a footnote, Valdez remarks that evidentiary problems in the state habeas court rendered its rejection of his ineffective-assistance-of-

Because there is no circuit split on the actual AEDPA deference issue raised by Valdez and decided by the Fifth Circuit, the Court should deny the petition for writ of certiorari. *See, e.g., Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (declining to review issues "neither raised before nor considered by the court of appeals").

## III. THE FIFTH CIRCUIT CORRECTLY CONSTRUED THE AEDPA.

The Court also should deny the petition for certiorari because the Fifth Circuit's construction of the AEDPA's deference provisions is correct and consistent with this Court's AEDPA jurisprudence. As the Court explained in *Williams*, the AEDPA "placed a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus," 529 U.S., at 412, and the Act precludes a federal court from issuing the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*, at 411. The Fifth Circuit's holding accurately reflects the new deference standards created in the AEDPA and appropriately effectuates Congress's statutory vision for habeas reform.

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counsel claim not only unreasonable, but also something other than an "adjudication" entitled to deference. Pet. 22 n.8. However, Valdez does not—and could not—argue that the state court failed to provide any rationale for its decision. *See* Resp. App. 5a-7a. Nor is the issue of deference to summary state-court decisions a "question presented" in Valdez's petition. *See* Pet. i.

Specifically, the Fifth Circuit properly concluded that a full and fair state-court hearing is not a prerequisite for application of the AEDPA's deferential framework. Pet. App. 27, 32, 37. Certainly, the absence of an adequate state hearing may influence a federal court's decision to conduct a federal evidentiary hearing as a procedural safeguard. Pet. App. 20 n.17. But it does not alter the standards of review prescribed in 28 U.S.C. §2254(d) and (e)(1). *Id.*

The Fifth Circuit's reading of the AEDPA strikes an appropriate balance between fairness and comity. And it is supported not only by the Act's plain text, but also its alteration of pre-AEDPA deference standards.

Prior to the AEDPA amendments, the former 28 U.S.C. §2254(d) required that state-court factual findings—not legal conclusions or findings of mixed fact and law—be afforded a presumption of correctness unless a petitioner demonstrated one of several statutory exceptions, including the absence of a "full, fair, and adequate hearing in the State court proceeding." Pet. App. 15 (quoting former §2254(d)(6)). The Fifth Circuit correctly observed, however, that the AEDPA "jettisoned all references to a 'full and fair hearing' from the presumption of correctness accorded state court findings of fact" in favor of the "presumption of correctness erected in its place at §2254(e)(1)." Pet. App. 17. Consequently, to resurrect the "full and fair hearing" deference exception in former §2254(d) "would have the untenable result of rendering the amendments enacted by Congress a nullity." *Id.*

The Fifth Circuit's construction of the AEDPA does not "break new ground," as Valdez erroneously states. Pet. 11. To the contrary, the Fifth Circuit merely heeded this Court's admonition in *Williams* that the AEDPA's new constraints on habeas relief should not be interpreted in a manner that renders them "a nullity." 529 U.S., at 407; *see also id.* at 403-04. And that is precisely what would occur under Valdez's proposed reading of the statute—which

reinserts a full and fair hearing requirement that Congress clearly removed when it replaced former §2254(d)'s factual-deference standard with the new factual presumption of correctness in §2254(e)(1).

Additionally, Valdez's attempt to rewrite the AEDPA is untenable because it ignores the Act's creation of a new deference framework for questions of law and mixed questions of law and fact. These questions were not covered by former §2254(d) or its adequate-hearing requirement and, therefore, were subject to plenary federal review. *See Williams*, 529 U.S., at 400 (O'Connor, J., concurring) (citing *Miller v. Fenton*, 474 U.S. 104, 112 (1985)); *cf. Wright v. West*, 505 U.S. 277, 287-94 (1992) (plurality). Now, however, the AEDPA expressly requires federal habeas courts to defer to state-court adjudications of legal and mixed questions that are "reasonable"—even if incorrect. *Williams*, 529 U.S., at 410-13 (discussing 28 U.S.C. §2254(d)(1) and highlighting that an "unreasonable application of federal law"—for which the writ may issue—"is different from an incorrect application of federal law"—for which the writ may not issue). No comparable deference requirement existed prior to the AEDPA, and certainly one was not reflected in former §2254(d).

Nonetheless, Valdez inexplicably argues that former §2254(d)'s adequate-hearing exception for *factual* deference should be not only resurrected but imported into the AEDPA's *legal* deference scheme currently codified in §2254(d)(1). This approach is illogical. Moreover, as the Fifth Circuit observed, "[t]he plain meaning of the text simply will not bear such a reading." Pet. App. 19.[13]

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13. Indeed, all of Valdez's statutory-construction arguments suffer from the same flaw: dependence on an implied-hearing prerequisite that lacks support in the AEDPA's plain text.

Finally, Valdez erroneously argues that the Fifth Circuit's refusal to graft an implicit adequate-hearing requirement onto the AEDPA's deferential framework deprives him of his right to a federal evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The Fifth Circuit, however, did not hold that it was improper for the district court to conduct an evidentiary hearing. Nor did it order the district court to disregard any of the evidence it heard during that hearing.[14] Rather, the Fifth Circuit expressly stated that the district court, on remand, may use evidence from the hearing to facilitate its reevaluation of Valdez's ineffective-assistance-of-counsel claim under the correct AEDPA standards. Pet. 20-22 & n.17. That is the proper accommodation of *Townsend*'s principles within the AEDPA framework. *See Pecoraro v. Walls*, 286 F.3d 489, 443 (CA7 2002) (stating, in approving the Fifth Circuit's approach, that a federal evidentiary hearing may bear on the reasonableness analysis under §2254(d)(1), but "we do not see why it should alter the *standard* of federal review") (emphasis in original).

Because the Fifth Circuit's remand does not negate the district court's evidentiary record, Valdez's alleged right to a federal hearing under *Townsend* remains unaffected by the Fifth Circuit's decision.[15] And to the extent Valdez complains that the AEDPA

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14. The Fifth Circuit did, however, order the district court to consider several of Respondent Cockrell's exhibits that improperly were excluded at the hearing and "tend to undercut Valdez's assertion that he is mentally retarded." Pet. App. 35-37.

15. Valdez claims he was entitled to a federal evidentiary hearing under *Townsend* because the state habeas court denied him a full and fair hearing. The Fifth Circuit never determined, however, whether this deprivation actually occurred. Instead, it assumed, without deciding, that the state court did not provide a full and fair hearing. Pet. App. 9-10. Resolving this question was immaterial because the court held that a full

requires more deference to state habeas adjudications than previously afforded under *Townsend*, the AEDPA controls the federal disposition of Valdez's claim. *See Williams*, 529 U.S., at 402-03, 412-13 (applying heightened deference under the AEDPA to a habeas petition filed after the Act's effective date).

In holding that an adequate state-court hearing is not a prerequisite to the application of the AEDPA's deferential scheme, the Fifth Circuit reached a conclusion supported by both the statutory text and the Act's alteration of pre-AEDPA deference

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and fair hearing is not a prerequisite for the AEDPA's deference requirements. Pet. App. 27. Thus, Valdez's claims had to be remanded for reconsideration under §2254(d) and (e)(1). Pet. App. 37.

Even if the Fifth Circuit's statutory deference analysis is incorrect—which it is not—the remand was still appropriate because, as Respondent Cockrell argued in the Fifth Circuit, the state court afforded Valdez an adequate two-day hearing. Although Valdez claims the state court did not read the trial transcript or review missing hearing exhibits immediately prior to making its determination, those allegations do not render the two-day hearing a nullity. The state court afforded Valdez an adequate opportunity to present evidence on his ineffective assistance of counsel claim. That court heard testimony about, and admitted into evidence, the mitigation-related exhibits Valdez claims were lost post-hearing; permitted lengthy oral argument pertaining to the findings of fact and conclusions of law after the hearing; confirmed that it would reread the transcript of the two-day habeas hearing, at which all evidence relating to Valdez's ineffective-assistance-of-counsel claim was extensively discussed; made detailed findings and conclusions that—contrary to Valdez's characterization—differed materially from the State's proposed findings; and provided a detailed rationale for its decision. *See* Resp. App. 5a-7a. Because there was an adequate state-court hearing, the federal district court had no basis to disregard the AEDPA's deferential framework. The Court should deny the petition for writ of certiorari because the Fifth Circuit's remand was proper for that reason as well.

standards. Additionally, the Fifth Circuit's reading of the AEDPA is bolstered by the Seventh Circuit's decision in *Pecoraro*. 286 F.3d, at 443. It is also consistent with this Court's analysis in *Williams*, which emphasized the importance of effectuating the AEDPA's "new constraint" on federal habeas courts and Congress's new vision for habeas reform. *See* 529 U.S. at 403-04, 412-13. Because the Fifth Circuit correctly construed the AEDPA's deference requirements, this case does not warrant review.

## IV. THE COURT SHOULD DECLINE TO REVIEW VALDEZ'S CONSTITUTIONAL CHALLENGES TO THE AEDPA, WHICH WERE NEVER PASSED UPON BY THE FIFTH CIRCUIT AND, REGARDLESS, ARE INCONSISTENT WITH THIS COURT'S AEDPA JURISPRUDENCE.

In the Fifth Circuit, Valdez argued for the first time in the final pages of his petition for rehearing en banc that the AEDPA would violate Article III, the Supremacy Clause, and the Sixth and Fourteenth Amendments if—as the Fifth Circuit held—an adequate state-court hearing is not a prerequisite for deference. Valdez could have made and developed these arguments in his briefing to the panel, since Respondent Cockrell's briefs advocated the construction of the AEDPA ultimately adopted by the Fifth Circuit. But Valdez did not. And, because the Fifth Circuit declined to rehear the case en banc, the court never addressed these issues. Accordingly, this Court should follow its practice of not considering constitutional questions that are not "pressed or passed upon below" and decline to entertain Valdez's challenges to the AEDPA. *Duigan v. United States*, 274 U.S. 195, 200 (1927); *see also, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001); *Adickes*, 398 U.S., at 147 n.2.[16]

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16. Even assuming Valdez's petition for rehearing en banc sufficiently "pressed" these issues, they were never "passed upon" by the Fifth Circuit.

Regardless, Valdez's arguments do not warrant review because they lack merit. Valdez contends, for example, that the Fifth Circuit's reading of the AEDPA causes a "constitutional problem" under the Sixth Amendment because it "forces Valdez to show more than what *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] requires to establish an ineffective assistance of counsel claim." Pet. 28. But this Court recently confirmed that this is precisely what the AEDPA demands:

> "For respondent to succeed, however, he must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under §2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Bell v. Cone*, 122 S.Ct. 1843, 1852 (2002).

Rather, a federal court may issue the writ only if the state court's adjudication of a *Strickland* claim is unreasonable. *Id.*; *see also Williams*, 529 U.S., at 412-13.

Similarly, Valdez protests that the Fifth Circuit's construction of the AEDPA impermissibly conflicts with the Supremacy Clause because it forces federal courts to defer to state adjudications that are "erroneous." Pet. 30. This argument also is inconsistent with the Court's AEDPA precedent—under which the Fifth Circuit properly concluded that a federal court cannot substitute its judgment for that of a state court that adjudicates a federal question erroneously, but not unreasonably. *Williams*, 529 U.S., at 411; *see also Bell*, 122 S.Ct., at 1852.

Accordingly, even if Valdez's constitutional arguments are properly before the Court, no "constitutional problem" warrants review. Valdez has not raised an important and unsettled federal question that merits attention or requires reevaluation of the Court's AEDPA jurisprudence. *See* SUP. CT. R. 10(c).

## CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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August 19, 2002

CAUSE NO. 87-CR-1459-B
WRIT NO. 31,184-01

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| EX PARTE | )( | IN THE DISTRICT COURT |
| | )( | |
| | )( | OF NUECES COUNTY, TEXAS |
| | )( | |
| ALBERTO VALDEZ | )( | 117TH JUDICIAL DISTRICT |

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 28th day of February 1997, came on to be heard arguments on the parties' proposed findings of fact and conclusions of law in reference to the evidentiary hearing on Albert Valdez's Application for Post-Conviction Writ of Habeas Corpus and pursuant to the Court of Criminal Appeals's order dated June 26, 1996.

Came on November 26 and 27, 1990, and was conducted an evidentiary hearing on Applicant Alberto Valdez's Application for Post-Conviction Writ of Habeas Corpus, the Honorable Judge Joaquin Villareal sitting by special assignment.

Evidence was presented by the Applicant and by the State.

Presented by Applicant were: Carl Lewis, Ernestine Vasquez, Ms. Valeda Farmer, Olga Quintanilla, David Valdez, Mary Jane Barrientes, Shirley Lopez, Monica Lopez, Wayne Huff, Julio Garcia, Dr. Randy Price, Ms. Johnnie Grossman Bateman, Ms. Alexandra Banuelos, Ms. Jo Anna Banuelos, Dr. James Dyer, and Larry Bates.

Presented by the State were: Dr. Christopher Klaas and Ezekiel (Kiki) Rodriguez.

The hearing was recessed on November 27, 1990, to allow both parties to secure additional witnesses, if necessary. On September 24, 1996, on a motion by both parties, the evidence was closed.

The trial judge, accordingly, having all the evidence presented by the parties before him, makes the following findings:

1. Applicant was convicted of the offense of Capital Murder on May 16, 1988.

2. The Court of Criminal Appeals affirmed Applicant's conviction on May 24, 1989; his petition for writ of certiorari was denied on September 13, 1989.

3. On June 20, 1990, Applicant filed an application for post-conviction writ of habeas corpus raising the following twenty-four grounds of complaint.

I. Valdez was deprived of effective assistance of trial counsel in the sentencing phase in violation of the sixth and fourteenth amendments and Texas Law.

II. Trial Counsel's failure to investigate and present a complete case in mitigation violated the Eighth and Fourteenth Amendments by creating an unacceptable risk that Valdez was sentenced to death despite factors that called for a less severe penalty.

III. The second special issue of the Texas death penalty statute, as interpreted and applied by the Texas Court of Criminal Appeals, is unconstitutionally vague under the Eighth and Fourteenth Amendments.

IV. The admission of irrelevant unadjudicated extraneous offenses violated Valdez's right to a fair and reliable sentencing determination required by the Fifth, Sixth, Eighth, and Fourteenth Amendments and Texas law.

V. The trial court violated the Eighth and Fourteenth Amendments by instructing the jury on parole and then precluding

the jury from considering relevant evidence regarding parole eligibility.

VI. The Texas death penalty statute and the punishment charge precluded the jury from considering or giving effect to mitigating evidence presented on behalf of Valdez in violation of the Eighth and Fourteenth Amendments.

VII. The Texas death penalty statute and its consistent interpretation by the Court of Criminal Appeals, as applied to this case, precluded the jury from considering or giving effect to available mitigating evidence in violation of the Eighth and Fourteenth Amendments.

VIII. The Texas death penalty statute, on its face and as applied in this case, provides inadequate guidance to the jury on the meaning of critical terms in the special issues in violation of the Fifth, Eighth, and Fourteenth Amendments and Texas law.

IX. The instructions given at the penalty phase misled the jury regarding the effect of a "no" vote by a single juror in violation of the Fifth, Eighth, and Fourteenth Amendments and Texas law.

X. The Texas death penalty statute, as construed by the Texas Court of Criminal Appeals, violates the Eighth and Fourteenth Amendment prohibitions against mandatory sentences for any class of capital murderers.

XI. The Texas death penalty statute violates the Eighth and Fourteenth Amendments by failing to give the jury an option of imposing a sentence of life without parole.

XII. The State failed to disclose material exculpatory and mitigating evidence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and Texas law.

XIII. Valdez's death sentence was based upon an invalid conviction in violation of the Eighth and Fourteenth Amendments.

XIV. Valdez's death sentence was based upon invalid confessions in violation of the Eighth and Fourteenth Amendments.

XV. State's closing argument in the sentencing phase violated the Eighth and Fourteenth Amendments by focusing on the victim.

XVI. The introduction in evidence of six techniques used in disarming a police officer, without any showing that Valdez either knew or used such techniques, violated Valdez's rights to a reliable sentencing determination under the Eighth and Fourteenth Amendments by suggesting unfairly that he acted deliberately and is likely to be dangerous in the future.

XVII. The Texas court's admission of a gruesome, blood-soaked shirt worn by the victim inflamed the jury and violated the Eighth and Fourteenth Amendments.

XVIII. The trial court's denial of Valdez's Motion for Change of Venue violated his rights to a fair trial under the Fifth, Eighth, and Fourteenth Amendments and Texas law.

XIX. The trial court's denial of Valdez's Motion to Recuse violated Valdez's rights to a fair trial under the Fifth, Eighth, and Fourteenth Amendments and Texas law.

XX. The misconduct of the jury in considering evidence not properly admitted at trial violated Valdez's rights under the Sixth, Eight, and Fourteenth Amendments.

XXI. The trial court's failure to exclude for cause four jurors constitutionally unqualified to serve violated Valdez's Sixth and Fourteenth Amendment rights to a trial by an impartial jury.

XXII. The trial court's instructions at the punishment phase failed to inform the jury of the consequences of its "yes" answers to the special issue questions, and thus undermined its sense of

responsibility for the consequences of its verdict in violation of the Eighth and Fourteenth Amendments.

XXIII. It is cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments, to execute mentally retarded persons like Valdez.

XXIV. The totality of the trial court's constitutional errors in this case undermined the reliability of the jury's capital sentencing decision in violation of the Eighth and Fourteenth Amendments.

Relative to the above-listed allegations, the trial court makes the following specific findings of facts and conclusions of law.

I.

1. The standard for ineffective assistance of counsel is set forth in the following cases: Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), Hernandez v. State, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) and Ex Parte Kunkle, 852 S.W.2d 499, 504-506 (Tex Crim. App. 1993), cert. denied, 114 S.Ct. 122 (1993).

2. Review of alleged ineffective assistance of counsel is whether, but for the unprofessional errors of counsel, there is a reasonable probability that the outcome of the case would have been different.

3. Trial counsel's performance is to be evaluated in light of the representation as a whole, as of the time of trial. See Kunkle, 852 S.W.2d at 504-505.

4. Carl Lewis's performance at applicant's trial cannot be judged in hindsight.

5. There is insufficient evidence to show that Applicant's trial counsel rendered ineffective assistance of counsel.

6. There is insufficient evidence to show that there is a reasonable probability that, but for the alleged unprofessional errors of counsel, applicant would not have been sentenced to death.

7. The case of Penry v. Lynaugh, 492 U.S. 302, 338-340, 109 S.Ct. 2934 (1989), was decided after applicant's case was tried.

8. There is insufficient evidence that Carl Lewis gave ineffective assistance of counsel in applicant's case.

9. It is common in the Corpus Christi, Nueces County, Texas area for Hispanic males to drop out of school.

10. The fact that applicant had dropped out of school did not put Carl Lewis on notice of any potential mental problem of applicant, if any.

11. Carl Lewis's decision not to investigate more thoroughly applicant's background was a decision based upon reasonable professional judgment at the time of the case.

12. Carl Lewis's failure to request the entire court jacket regarding applicant's burglary charge in Hockley County did not fall below the professional standard of conduct for defense attorneys.

13. There is insufficient evidence that counsel did not adequately investigate applicant's case.

14. The record as a whole shows that Carl Lewis interviewed and presented punishment witnesses on Applicant's behalf.

15. Mary Jane Barrientess, a witness presented on habeas corpus, was also a witness at the punishment phase of Applicant's trial.

16. Shirley Lopez, a witness presented on habeas corpus, was asked to testify by Carl Lewis, but she declined to testify on Applicant's behalf at the punishment phase of trial.

17. The testimony of the character witnesses presented on habeas corpus review was cumulative of testimony presented at trial on punishment.

18. Counsel was not ineffective in that there is no reasonable probability that, but for the evidence presented at the habeas corpus hearing, the outcome of sentencing would have been different.

19. Carl Lewis exercised reasonable and sound professional judgment in deciding which individuals to present as punishment witnesses.

20. The court finds that Applicant received effective assistance of counsel.

II.

1. Applicant's second complaint reiterates the claim under point I. Applicant attempts to apply the Eighth and Fourteenth Amendments, which prohibit governments from taking certain actions, to the alleged misdeeds of trial counsel. There is no evidence in the record for the proposition that trial counsel's actions created an "unacceptable risk".

III.

1. The issue presented by point three has already been settled in Texas law against Applicant in Jurek v. Texas, 428 U.S. 262, 275-277, 96 S.Ct. 2950 (1976), which upheld the Texas statutory scheme for submitting special issues to the jury in capital cases.

2. The following Texas cases control this issue, holding that terms such as "deliberately" need not be defined in the special capital punishment issues. Johnson v. State, 853 S.W.2d 527, 537 rehearing denied, cert. denied, 510 U.S. 852, 114 S. Ct. 154, (1993); Camacho v. State, 864 S.W.2d 524 (Tex. Crim. App. 1993), cert. denied, 114 S.Ct. 1339 (1994); Corwin v. State, 870 S.W.2d 23, 36 (Tex. Crim. App. 1993), rehearing denied, cert. denied, 115 S.Ct. 95 (1994); Ex parte Kunkle, 852 S.W.2d 499, 507 (Tex. Crim. App. 1993).

3. The trial court did not err in failing to define specific terms in the special issues on punishment.

IV.

1. The issue of the admission of unadjudicated offenses at the punishment phase has been determined adversely to applicant. See Williams v. Lynaugh, 814 F.2d 205, 207 Cir. 1987), cert. denied, 108 S.Ct. 311 (1987); Smith v. State, 676 S.W.2d 379, 390 (Tex. Crim. App. 1984), cert. denied, 471 U.S. 1061, 105 S.Ct. 2173 (1985).

2. Any matter relevant to sentencing, including unadjudicated extraneous offenses, is admissible. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981 & Supp. 1997).

3. The trial court did not err or abuse its discretion in admitting unadjudicated extraneous offenses.

V.

1. There is no evidence that the jury considered parole laws in sentencing.

2. The punishment phase charge admonishing the jury not to consider parole in their deliberations did not constitute and impermissible "instruction on parole."

VI.

1. The question of whether a separate special issue is required in order to assure that effect is given to mitigating evidence has been determined in the following cases: Graham v. Collins, 113 S.Ct. 892, 897, 902-903 (1993) (requiring no special issue on mitigating factors such as acts of kindness, religious devotion, redeeming character traits, troubled family background), Richardson v. State, 879 S.W.2d 874, 884-885 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 741 (1995) (religious devotion, artistic talent are mitigation factors covered by the special issues), Ex parte Baldree, 810 S.W.2d 213, 216-217 (Tex. Crim. App. 1991) (evidence of non-violent past properly covered by statutory special issues).

2. The trial court followed the requirements of Texas law in its instructions to the jury on capital murder special issues.

3. The statutory special punishment issues provide appropriate constitutional means for the jury to consider and give effect to mitigating evidence.

4. The statutory special punishment issues submitted to Applicant's jury allowed Applicant's jury to consider and give effect to mitigating evidence.

VII.

1. The evidence of drug use, childhood hardship and abuse, creativity, artistic talent, and kindliness towards family was known and available to the applicant at the time of trial.

2. Evidence of kindness and family assistance was presented at punishment by the testimony of applicant's brother Daniel Valdez, Mary Jane Barrientes, Julie Saldana, and Maria Saldana.

3. The testimony of the character witnesses presented on habeas corpus review was cumulative of testimony presented at trial on punishment.

4. Applicant made no contemporaneous offer of proof of further evidence on childhood hardship, child abuse, creativity, artistic talent, and family and religious devotion at trial.

5. Under Ex Parte Kunkle, 852 S.W.2d 499, 504 (Tex. Crim. App. 1993), cert. denied, 114 S.Ct. 122 (1993), Applicant was required to present mitigating evidence via a bill of exceptions in order for such evidence to be considered on habeas review.

6. Carl Lewis's failure to present more of this type of evidence was a decision of trial strategy which was sound and reasonable as judged at the time of trial.

7. Texas law at the time of trial required no separate special issue on mitigation evidence.

8. The mitigating evidence advanced by Applicant could be given effect by the special issues as forumulated under Texas law at that time, and which were submitted to Applicant's jury. Graham v. Collins, 113 S.Ct. 892, 901-902 (1993).

VIII.

1. The Court finds that the issue of definition of certain terms in the special punishment issues has already been resolved adversely to applicant under case law which has determined that the trial court is not required to define terms such as "deliberately," under Johnson v. State, 853 S.W.2d 527, 537 (Tex. Crim. App. 1992), rehearing denied, cert. denied, 510 U.S. 852, 114 S.Ct. 154, (1993), nor terms such as "criminal acts of violence," "probability," "society," "future dangerousness," under Camacho v. State, 864 S.W.2d 524 (Tex. Crim. App. 1993), cert. denied, 114 S.Ct. 1339 (1994); Corwin v. State, 870 S.W.2d 23, 36 (Tex. Crim. App. 1993), rehearing denied, cert. denied, 115 S.Ct. 95 (1994).

2. The case of Ex Parte Kunkle, which held that the trial court correctly declined to define the terms contained in the statutory special issues of Art. 37.071, controls the issue and is adverse to applicant. Ex Parte Kunkle, 852 S.W.2d 499, 506-507 (Tex. Crim. App. 1993), cert. denied, 114 S.Ct. 122 (1993).

3. The United States Supreme Court approved of the Texas statutory scheme of special issues in Jurek v. Texas, 428 U.S. 262 (1976).

IX.

1. Arnold v. State, 873 S.W.2d 27, 37-38 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 103 (1994), which held that the trial court did not err in failing to instruct the jury about the affect of a no vote by a single juror, controls this issue, and is adverse to applicant.

2. The instructions given the jury in this case at the punishment phase complied with those mandated by Texas law under art. 37.071 of the Texas Code of Criminal Procedure.

3. The Court finds that this issue has been determined adversely to Applicant in Jurek v. Texas, 428 U.S. 262, 275-277, 96 S.Ct. 2950 (1976), which upheld the Texas statutory scheme for special issues in capital cases.

4. There is no evidence that the jury was misled by the instructions given.

X.

1. The statutory scheme for punishment in Texas does not mandate a sentence for any class of capital murderers.

2. This issue has been decided against Applicant in Jurek v. Texas, 428 U.S. 262 (1976) and Arnold v. State, 873 S.W.2d 27, 37-38 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 103 (1994).

XI.

1. The instructions given the jury at the punishment phase in this case complied with those mandated by Texas law under art. 37.017 of the Texas Code of Criminal Procedure.

2. This issue has been decided against Applicant in Arnold v. State, 873 S.W.2d 27, 39-40 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 103 (1994).

3. The point presents no fact issue to be determined, as the availability of a life-without-parole sentence option is a question for the Legislature. A judicial mandate for such a sentence would violate the separation of powers doctrine.

XII.

1. There is no evidence that Applicant did not receive information requested and listed as "complete" by the trial court on the discovery motions.

2. There is no evidence that a member of the prosecution team had actual possession, control of, or knowledge of, any exculpatory or

mitigating evidence which it failed to produce as required by Brady v. Maryland, 393 U.S. 83, 83 S.Ct. 1194 (1963).

3. The court finds that knowledge of psychological testing and evaluations was known to the applicant, and no duty inured to the State to produce such evidence under Havard v. State, 800 S.W.2d 195, 204-205 (Tex. Crim. App. 1989).

XIII.

1. There is no evidence that any of applicant's prior convictions were void.

2. Applicant's point is an attack on the trial court's decision to admit evidence of the federal conviction, and as such, is a question of trial error.

3. There is no evidence that the trial court abused its discretion in admitting such evidence.

XIV.

1. The Court finds that the claim of invalid confessions is more properly addressed by direct appeal, but was not raised there.

2. This is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

3. This is not a proper ground for a writ of habeas corpus, as applicant's sentence was not based on an invalid confession.

4. There is no evidence that trial court abused its discretion in denying applicant's motion to suppress.

XV.

1. The allegation of improper closing argument is not a proper ground for a writ of habeas corpus. Alleged impropriety in arguments is an issue which should be raised on direct appeal, but was not raised in this case. This is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

2. The Court finds that the argument on Bock's feelings at death does not constitute a "victim impact statement."

3. Assuming without deciding that prosecutorial argument focused on the victim, the Court finds that the opinions in South Carolina v. Gathers, 490 U.S. and Booth v. Maryland, 482 U.S. 496 (1987), have been overruled by Payne v. Tennessee, 111 S. Ct. 2597, 2604-2611 (1991), which now allows victim impact evidence in capital sentencing.

XVI.

1. The Court finds that the claim of error in the admission of demonstrative evidence on weapons disarming techniques was determined adversely on direct appeal in Valdez v. State, 776 S.W.2d 162, 168 (Tex. Crim. App. 1989), cert. denied, 495 U.S. 963 (1989). As such, this is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

2. Applicant is not entitled to relitigate direct appeal issues on habeas corpus. See generally Ex Parte Drake, 883 S.W.2d 213 (Tex. Crim. App. 1994).

3. There is no evidence that the trial court abused its discretion in allowing the demonstrated techniques.

XVII.

1. The claim of trial error in the admission of the bloody police shirt was determined adversely on direct appeal in Valdez v. State, 776 S.W.2d 162, 168 (Tex. Crim. App. 1989). As such, this is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

2. Applicant is not entitled to relitigate matters already addressed on appeal. See generally Ex Parte Drake, 883 S.W.2d 213 (Tex. Crim. App. 1994).

3. There is no evidence that the trial court abused its discretion in allowing evidence of the bloody shirt.

XVIII.

1. A complaint about the denial of the Motion to Transfer Venue is more properly addressed by direct appeal, but was not raised there.

2. This is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550

S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

3. Denial of a motion to change venue is reversible only upon a showing of abuse of discretion. Hathorn v. State, 848 S.W.2d 101, 109 (Tex. Crim. App. 1992), cert. denied, 113 S.Ct. 3062 (1993).

4. There is no evidence that the trial court abused its discretion in denying the motion to change venue.

XIX.

1. The denial of a motion to recuse is not properly cognizable on habeas corpus review. This claim is more properly addressed by direct appeal, but was not raised there.

2. This is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

3. There is no evidence that the trial court was biased against applicant.

4. There is no evidence that the trial court abused its discretion in denying applicant's motion to recuse.

XX.

1. There is no evidence that juror Bateman in fact viewed the actual crime scene.

2. There is no evidence that juror Bateman discussed any of her field observations with the others on the jury.

3. There is no evidence that the jury received any outside evidence.

4. There is no evidence of any juror misconduct.

5. There is no evidence the jury's verdict was influenced by any extrinsic evidence.

6. Applicant could not have suffered any harm due to the fact that the jury did not receive any outside information.

XXI.

1. This is not a proper ground for a writ of habeas corpus, as it constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

2. There is no evidence that the trial court erred or abused its discretion in failing to grant applicant's challenges for cause.

XXII.

1. The trial court followed the mandates of Texas law in its instruction.

2. The claim that the trial court should be required to instruct jurors on the effect of "yes" answers to special issues has been substantially decided against Applicant in Jones v. State, 843 S.W.2d 487 (Tex. Crim. App. 1992), rehearing denied, cert. denied 507 U.S. 1035, 113 S. Ct. 1858; (see also Arnold v. State, 873 S.W.2d 27, 37-38 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 103 (1994), which held that the trial court did not err in failing to instruct the jury about the affect of a no vote by a single juror).

XXIII.

1. Pursuant to Penry v. Lynaugh, 492 U.S. 302, 338-340, 109 S.Ct. 2934 (1989), the Court finds, without deciding the issue of Valdez's mental retardation, if any, that the execution of mentally retarded

individuals does not per se violate the Eighth and Fourteenth Amendments.

2. The fate of mentally retarded individuals with regard to capital punishment is an issue for legislative determination, as a strict mandate by the Courts would violate the separation of powers doctrine.

XXIV.

1. This is not a proper ground for a writ of habeas corpus, as it is vague, conclusory, and constitutes an attack on trial error which would merely render the judgment voidable rather than void. See Ex Parte Sadberry, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993); Ex Parte Truong, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989), Ex Parte Shields, 550 S.W.2d 670, 675 (Tex. Crim. App. 1976) (Opinion on State's Motion for Rehearing).

The Court accordingly finds that there is no need for any further evidentiary hearing.

The Court finds that the assertions contained in the application for writ have not been proven by the applicant, and are without merit. Having found the that the petition is without merit and should be denied, the Court recommends that the relief requested in the petition be, in all respects, denied.

/s/ Joaquin Villarreal
Joaquin Villarreal
JUDGE PRESIDING

CAUSE NO. 87-CR-1459-B
WRIT NO. 31,184-01

| | | |
|---|---|---|
| EX PARTE | )( | IN THE DISTRICT COURT |
| | )( | |
| | )( | OF NUECES COUNTY, TEXAS |
| | )( | |
| ALBERTO VALDEZ | )( | 117TH JUDICIAL DISTRICT |

ORDER

1. The court directs the clerk of this court to file these findings and transmit them along with the Writ Transcript to the Clerk of the Court of Criminal Appeals as required by law.

2. The clerk of this court is ordered to send a copy of this Memorandum and Order to the petitioner and to the appellate section of the District Attorney's office.

SIGNED AND ORDERED ENTERED this 31st day of March, 1996.

/s/ Joaquin Villarreal
Joaquin Villarreal
JUDGE PRESIDING

**IN THE COURT OF CRIMINAL APPEALS**
**AUSTIN, TEXAS**

EX PARTE ALBERTO VALDEZ

WRIT NO. 31, 184-01

Habeas Corpus Application from **NUECES** County

**ORDER**

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Art. 11.07, V.A.C.C.P.

On May 13, 1998, applicant was convicted of the offense of capital murder. After the jury returned affirmative answers to the special issues submitted under Art. 37.071, V.A.C.C.P., punishment was assessed at death. This Court affirmed applicant's conviction on direct appeal. Valdez v. State, 776 S.W.2d 162 (Tex.Cr.App. 1989).

In the instant cause, applicant presents twenty-four allegations in which he challenges the validity of his conviction and resulting sentence. The trial court held an evidentiary hearing. Ultimately, the trial court entered findings of fact and conclusions of law and recommended the relief sought be denied.

This Court has reviewed the record. The findings and conclusions entered by the trial court are supported by the record, and upon such basis, the relief sought is denied.

IT IS SO ORDERED THIS THE 13th DAY OF ~~JULY~~ AUGUST, 1997.

PER CURIAM

En banc
Do not publish

No. 02-99

(3)

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

ALBERTO VALDEZ,

*Petitioner,*

v.

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF *AMICUS CURIAE* PAUL RICHARD COLELLA IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

Paul Richard Colella is on Texas's death row. The parties have authorized him to file this brief, which raises two new matters. First, 28 U.S.C. § 2254's deferential scheme should not apply when the Texas habeas process, as applied, does not meet due process standards. Second, the failure of the Texas habeas process is not unique to Valdez. The Texas courts gave no consideration to Colella's habeas petition, now pending in federal district court. Instead of answering the state habeas application, as required, the State submitted proposed findings of fact and conclusions of law, which depended mainly on unpleaded defenses. Three (3) days later, a specially-appointed Texas trial judge, who did not preside over Colella's trial, rubber-stamped the findings without a hearing and without even notifying Colella of his intent to do so. At every stage, Colella objected. The Texas courts ignored Colella's objections. With knowledge of Colella's objections to the violations of Texas habeas procedure, the Texas Court of Criminal Appeals issued a *per curiam* order denying Colella relief while acknowledging Colella had not had a hearing in the Texas courts.[2] Texas now cites the

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[1] In compliance with Supreme Court Rule 37.6, counsel for *amicus curiae* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations made a monetary contribution to the preparation and submission of this brief, which counsel has prepared on a *pro bono* basis.

[2] In 1998, the Texas Court of Criminal Appeals dismissed Colella's first habeas application because court-appointed counsel missed the filing date. New counsel was then appointed. After the passage of a new law, Texas recognized that Colella was allowed to file a new habeas application, which is the application referenced in this brief.

deferential scheme under 28 U.S.C. § 2254 in seeking dismissal of Colella's federal habeas petition.

## SUMMARY OF ARGUMENT

Texas recognizes the writ of habeas corpus as a writ of right, and under the Texas Constitution, the Texas legislature has established a procedure in Texas Code of Criminal Procedure article 11.071 for the Texas courts to review habeas applications filed by inmates in State custody. Texas courts have flaunted the procedure or have applied it without affording minimal procedural protection, all to the detriment of the interest to be protected. A federal court should not be required to defer to the Texas habeas court's findings of fact and legal conclusions under 28 U.S.C. § 2254 given the right at issue and the lack of procedural fairness in the resolution of the right.

## ARGUMENT

### 1. 28 U.S.C. § 2254 Does Not Eliminate Procedural Regularity and Fairness in the State Habeas Process.

The decision below requires a federal court to impose 28 U.S.C. § 2254's deferential scheme to the "findings of fact and legal conclusions" even though they were drafted by the State's attorney and signed by the State trial judge who did not preside over Valdez's capital murder trial, without any meaningful review of the trial and habeas record. Valdez's petition documents the flawed process. The Texas trial court elected not to read the trial transcript and ignored relevant evidence. In the judge's own

chilling words: "'I have never read the record of the trial and I don't intend to. I don't have the time.'" *Valdez v. Johnson*, 93 F. Supp.2d 769, 776 (S.D. Tex. 1999), *rev'd*, 274 F.3d 941 (5th Cir. 2001).

The decision below holds that this conduct is irrelevant. *Valdez v. Cockrell*, 274 F.3d 941, 946 (5th Cir. 2001) (refusing to address whether the state habeas court denied Valdez a full and fair hearing because a hearing "is not a prerequisite to the operation of AEDPA's deferential scheme"). According to the panel, the critical issues are whether the Texas court had "an adjudication on the merits" (*id.* at 946, 950) or made "a determination of a factual issue" (*id.* at 949-51).

According to Judge Dennis, the Texas court's process defied "'general notions of procedural regularity and substantive accuracy,'" which are part and parcel of the body of habeas corpus law. *Id.* at 973 (Dennis, J., dissenting). Judge Dennis is correct.

In a federal habeas case involving the death penalty, a plurality of this Court wrote that "this Court has demanded that factfinding procedures aspire to a heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (citing *Spaziano v. Florida*, 468 U.S. 447, 456 (1984)). The rationale rests in the Court's death penalty jurisprudence: "[t]his especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Id.* (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, J.J.)). This Court has held that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Monge v. California*, 524 U.S. 721, 732 (1998).

*Ford* involved federal court habeas review of Florida's adjudication of insanity alleged in the inmate's habeas petition. The insanity allegation prompted an inquiry by Florida's governor, with the assistance of psychiatrists, to determine whether the condemned had a certain mental capacity. 477 U.S. at 412. The Governor's office refused to consider materials from the inmate's counsel. *Id.* A plurality in *Ford* wrote that "[a]lthough the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether." *Id.* at 411. Florida's procedure was "inadequate to preclude federal redetermination of the constitutional issue." *Id.* at 416.

The Great Writ is "anchored in the ancient common law and in our Constitution." *Townsend v. Sain*, 372 U.S. 293, 311 (1963). The "opportunity for redress" through habeas corpus "presupposes the opportunity to be heard, to argue and present evidence" and this opportunity "must never be totally foreclosed." *Id.* at 312. The process involves adjudication of facts necessary for resolution of the writ in a death case. It should have a high regard for the truth. *Ford*, 477 U.S. at 411.

Colella respects the limited application of the heightened standard of reliability in the habeas context. *See, e.g.*, *Murray v. Giarrantano*, 492 U.S. 1 (1989). In his concurring opinion in *Ford*, Justice Powell invoked "fundamental fairness" as "the hallmark of the procedural protections afforded by the Due Process Clause." 477 U.S. at 424. Florida's insanity procedure was not fair and it invited arbitrariness and error. *Id.* at 424-25. The petitioner's claim "was not adjudicated fairly within the meaning of due process *or* of § 2254(d)." *Id.* at 427 (emphasis added).

In other words, due process could be considered separate from the then-effective section 2254(d). No reason justifies ignoring due process considerations as to the current section 2254.

## CONCLUSION

The Great Writ offers the lower federal courts their chance to assure that a person's Constitutional rights are protected before a State executes him. If the federal court must defer to the state findings even though the state court conducted a flawed review or no review, then "federal *habeas* review has been reduced to nothing more than a search for the state judge's signature – a classic example of exalting form over substance." *Valdez v. Cockrell*, 288 F.3d 702, 706 (5th Cir. 2002) (Wiener, Parker, JJ., dissenting). Valdez's petition for writ of certiorari should be granted to assure that the federal habeas process is more than a ministerial act. The state habeas court, knowing a life was at stake, unabashedly elected to ignore the trial transcript and evidence. The federal court should not be required to attach significance to the Texas court's signature when the process giving rise to the signature is unfair and unreliable.

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-99

# In The Supreme Court of the United States

ALBERTO VALDEZ,

*Petitioner,*

versus

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF AMICUS CURIAE THE CORNELL DEATH PENALTY PROJECT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED[1]

I. WHETHER 28 U.S.C. §2254(e)(1)'S PRESUMPTION OF CORRECTNESS SHOULD APPLY TO "FINDINGS" ADOPTED BY A STATE COURT JUDGE WHO LOST THE EXHIBITS INTRODUCED AT THE EVIDENTIARY HEARING, AND WAS ADMITTEDLY UNFAMILIAR WITH THE RECORD UPON WHICH THOSE "FINDINGS" WERE BASED.

II. WHETHER 28 U.S.C. §2254(d)'S LIMITATION ON HABEAS RELIEF SHOULD APPLY TO A STATE COURT "DECISION" DENYING RELIEF PREPARED BY THE STATE AND ADOPTED ALMOST *VERBATIM* BY A JUDGE WHO EXPRESSLY REFUSED TO REVIEW THE RECORD, AND LOST THE EXHIBITS ADMITTED AT THE STATE COURT EVIDENTIARY HEARING.

III. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT 28 U.S.C. §2254(d)'S LIMITATION ON RELIEF GOVERNS A FEDERAL DISTRICT COURT'S CONSIDERATION OF CLAIMS AS TO WHICH THE DISTRICT COURT PROPERLY HELD AN EVIDENTIARY HEARING AND TOOK EVIDENCE NOT CONSIDERED BY THE STATE HABEAS COURT.

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[1] While the formulation of the Questions Presented herein differs from those set forth in the Petition for a Writ of Certiorari, this difference is simply a function of *amicus*' focus on the Fifth Circuit panel majority's treatment of the important habeas corpus issues contained in this case. Viewed in that light, *amicus* believes that the formulation of the Questions Presented in this brief is entirely consistent with the contents of the Petition for a Writ of Certiorari.

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## INTEREST OF *AMICUS CURIAE*

The Cornell Death Penalty Project is an undertaking of the Cornell Law School. One of the Project's primary goals is to address questions of law that carry important implications beyond the facts of any particular case and that involve the basic fairness of the death penalty's administration. In keeping with this objective, the Project is attentive to developments in the law of federal habeas corpus, and maintains a strong interest in seeking to ensure that prisoners under sentence of death are afforded access to meaningful review of their claims for relief. The Project accordingly seeks to intervene as *amicus curiae* in selected cases presenting important questions of law which implicate these interests.

## INTRODUCTION

*Amicus curiae* submits this brief pursuant to Supreme Court Rule 37.2 in support of Alberto Valdez' Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.[2] In the view of *amicus*, this case presents no fewer than three significant and recurring issues arising out of 28 U.S.C. §§2254(d) and (e), as amended by the AEDPA. As this Court recently observed, the AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas

[2] Pursuant to Rule 37.6, *amicus* certifies that this brief was authored entirely by counsel for *amicus*. No persons or entities other than *amicus* made monetary contributions to the preparation or submission of this brief.

'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Cone v. Bell*, 122 S.Ct. 1843, 1849 (2002). In this case, the question is not whether a responsibly wrought state court decision was denied its due under this new regime. Rather, it is whether the AEDPA's mechanisms for preventing "federal habeas 'retrials'" and ensuring respect for the work of state courts should apply to cases at the opposite end of the spectrum: those in which the state court's disposition of a death-sentenced prisoner's claim was arrived at through a procedure devoid of concern for accuracy or fairness.

A majority of the Fifth Circuit panel in petitioner's case resolved this question in a manner that marks a dramatic turn away from principles of fairness and safeguarding the integrity of judicial proceedings, and a move toward truly "rubber stamp" review, in which literally anything bearing the mark of a state judicial officer is automatically entitled to "deference," regardless of its content or its true origins. *Amicus* submits this brief because it does not believe the AEDPA requires, or even authorizes, such meaningless review, and because, without this Court's intervention, the panel majority's opinion in petitioner's case is certain to adversely affect large numbers of prisoners whose constitutional claims will be obscured behind a curtain of deference, drawn not because those claims have already received a fair examination, but merely because they are referred to in a document bearing the signature of a state court judge.

## REASONS THE WRIT SHOULD BE GRANTED

### A. Application of 28 U.S.C. §2254(e)(1)'s presumption of correctness to "findings" adopted by a state court judge who was admittedly unfamiliar with the record, and who lost the exhibits introduced at the state court evidentiary hearing, is inappropriate.

The state habeas judge in this case, who did not preside over petitioner's trial, lost the exhibits introduced in support of petitioner's claims for relief, and openly acknowledged that he "'had never read the record of the trial'" at any time before adopting the state's proposed findings and denying relief. *Valdez v. Cockrell*, 274 F.3d 941, 944 (5th Cir. 2001) (internal citation omitted).[3] In the ensuing federal habeas proceedings, the district court recognized that "[a] few of these findings were specific and apparently were not tainted by the fact that the state habeas judge had effectively excluded . . . some of the most critical evidence." *Valdez*, 93 F.Supp.2d at 777-778. As to those "few" findings, the district court applied §2254(e)(1)'s presumption of correctness. *Id.* With regard to the state court's "more general conclusions" concerning the effectiveness of petitioner's trial counsel, however, the district court declined to apply §2254(e)(1) on the ground that those conclusions were not the product of a full and fair state court hearing. *See id.*

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[3] *See also Valdez v. Johnson*, 93 F.Supp.2d 769, 776 (S.D.Tex. 1999) ("At a hearing on the petition, the state habeas judge stated 'I have never read the record of the trial and I don't intend to. I don't have the time'").

On the state's appeal of the district court's order granting sentencing phase relief, the Fifth Circuit panel majority rejected the district court's approach to §2254(e)(1), holding that "a full and fair hearing is not a precondition to according §2254(e)(1)'s presumption of correctness to state habeas court findings of fact. . . . " *Valdez*, 274 F.3d at 949. As the dissenting member of the panel, and the four circuit judges who dissented from the denial of rehearing *en banc* recognized, the panel majority's holding fails to heed this Court's longstanding pronouncements concerning the effect of state court factual determinations in federal habeas cases, and poses a genuine threat to the fairness of habeas proceedings in the Fifth Circuit, and elsewhere.

Nearly forty years ago, this Court observed that,

> because detention . . . obtained [in violation of the Constitution] is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. . . . It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.

*Townsend v. Sain*, 372 U.S. 293, 312 (1963) (citing *Frank v. Mangum*, 237 U.S. 309, 345-350 (1915) (dissenting opinion of Mr. Justice Holmes)). To be sure, the scope of the rule adopted by the Court in *Townsend* has been narrowed in the years since its announcement, both by Congress' codification of a presumption of correctness in 1966, and by this Court in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (requiring petitioners who negligently failed to develop the factual bases of their claims in state court proceedings to demonstrate "cause and prejudice" before

being entitled to a federal evidentiary hearing). What has never changed, however, is this Court's adherence to the fundamental principle that federal courts properly exercising habeas jurisdiction must not be blindly bound to a state court's factual determinations where the state court "has failed to afford a full and fair adjudication of the federal contentions raised . . . because in the particular case the remedy afforded by state law proves in practice . . . [to be] seriously inadequate." *Ex parte Hawk*, 321 U.S. 114, 118 (1944).[4]

The Fifth Circuit panel majority's decision in this case is a dramatic and unwarranted departure from the course this Court has followed for decades. Because *Townsend*'s recognition that "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues" is as at least as true today as it was in 1963, the panel majority's decision is also a uniquely dangerous one for habeas petitioners. The "procedure" out of which the state habeas court's "findings" rejecting petitioner's ineffective assistance of counsel claim emerged could not have been any less "full and fair." The state court judge simply signed off on the proposed findings submitted by petitioner's adversary – a party not lacking familiarity with the procedural advantages to be

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[4] *See Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (even after AEDPA, "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights. . . . Congress [has] expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights . . . "); *see also Engle v. Isaac*, 456 U.S. 107, 126 (1982) ("[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence" and stands as "a bulwark against convictions that violate 'fundamental fairness' ").

gained by securing judicial adoption of one-sided factual determinations[5] – and did so after unabashedly declaring that he had not read, and did not intend to read, the trial record, and that he had lost the evidence submitted during the hearing seven years prior to entry of the judgment.[6]

The panel majority explained its conclusion that a federal court must presume factual findings produced via the procedure described above correct by stating that the AEDPA "jettisoned all references to a 'full and fair hearing' from the presumption of correctness," such that "reintroduc[tion] [of] a full and fair hearing requirement that would displace application of §2254(e)(1)'s presumption would have the untenable result of rendering the amendments enacted by Congress a nullity." *Valdez*, 274 F.3d at 949-950.[7] Stated more directly, the panel majority believed

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[5] *See Rudenko v. Costello*, 286 F.3d 51, 75 (2nd Cir. 2002) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985)) (recognizing "the 'potential for overreaching and exaggeration on the part of attorneys,' frequently exhibited when they are preparing findings of fact after learning that the judge has decided in their favor").

[6] Under this approach, it would have been impossible for the state habeas court to perform the analysis of petitioner's ineffective assistance of counsel claim mandated by this Court's jurisprudence, since that analysis relies in large part upon a review of the trial record, as well as the evidence presented in post-conviction proceedings. *See (Terry) Williams v. Taylor*, 529 U.S. 362, 398-399 (2000); *see also Dobbs v. Zant*, 506 U.S. 357, 358 (1993) ("We have emphasized before the importance of reviewing capital sentences on a complete record").

[7] *See also id.* ("Valdez would have us ignore the fact that Congress has excised this prerequisite from §2254's presumption of correctness . . . "); *id.* at 951 n.17 ("We cannot . . . second guess the intent of Congress in this manner"; "Congress's omission of language of a full and fair hearing is clear").

that, because Congress did not expressly retain subdivisions (1) through (8) of the former §2254(d) when it moved the presumption of correctness to §2254(e)(1), the conditions enumerated in those subdivisions were silently stricken from habeas practice. As Judge Dennis persuasively explained in his dissent from the panel's opinion, this need not – and certainly should not – be the case. *See Valdez*, 274 F.3d at 965-968.

In addition to the arguments set forth in Judge Dennis' dissent, with which *amicus* concurs, there are other reasons not to interpret Congress' revision of §2254(e)(1) as having accomplished the sweeping change attributed to it by the panel majority. First, Congress undoubtedly approached the formulation of the AEDPA, including §2254(e)(1), with a presumption of regularity. At the very least, it is unsafe to assume that Congress envisioned cases like petitioner's, in which the state court's role in making factual findings was essentially limited to signing a document prepared by a party to the proceeding without so much as reading the record. That Congress worked under such a presumption finds support in §2254(d), which closely circumscribes a federal court's authority to grant habeas relief, but permits such relief to be granted where the state court's rejection of a petitioner's claim was not objectively reasonable. *See Williams*, 529 U.S. at 409. Nothing in the text or history of the AEDPA suggests that this reasonableness baseline should not extend to §2254(e)(1)'s presumption of correctness.

Second, it is entirely possible that the AEDPA's abbreviated version of the presumption of correctness is a product of simple omission: Congress revised nearly all of §2254, adding some entirely new subdivisions and

reassigning others, and it is entirely plausible that while Congress considered it important to retain the statutory presumption of correctness, less attention was paid to the particulars of the presumption's operation than was paid to some of the other, arguably more significant changes the AEDPA introduced. *Cf. Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("in a world of silk purses and pigs' ears, the Act is not a silk purse of statutory drafting").

Finally, to the extent that Congress' failure to expressly retain the language of the former §2254(d) may be read to suggest some relaxation of the preconditions to application of the presumption of correctness, this Court is both authorized and obligated to establish a "floor," below which state court factual findings may not enjoy statutory deference. As discussed above, the Court's historical concern for the integrity of the facts upon which a federal habeas court's decisions necessarily rest, *see Ex Parte Hawk*, *supra*, leaves no room for blind deference for factual findings arrived at through the sham procedure employed by the state habeas court in petitioner's case. Thus, at the very least, this Court should exercise its authority to reaffirm the longstanding principle that a federal court faced with state court factual determinations reached after something well short of a full and fair proceeding need not stay its hand with respect to "the resolution of contested factual issues." *Townsend*, 372 U.S. at 312. *Cf. Horn v. Banks*, 122 S.Ct. 2147 (2002) (reaffirming applicability of *Teague v. Lane*, 489 U.S. 288 (1989) nonretroactivity doctrine in post-AEDPA cases, notwithstanding §2254(d)(1)'s "clearly established" clause); *Carey v. Saffold*, 122 S.Ct. 2134, 2138 (2002) (interpreting 28 U.S.C. §2244(d)(2) in light of longstanding concerns for comity and full exhaustion of state remedies); *Duncan v.*

*Walker*, 533 U.S. 167, 178 (2001) (similar); *Sanders v. United States*, 373 U.S. 1, 12-17 (1963) (federal habeas court must adjudicate successive claim brought via §2255 when "ends of justice" so require, even though language of §2255 contains no requirement that it do so).

### B. The limitation on relief in 28 U.S.C. §2254(d) should not apply to a state court "decision" prepared by the state and adopted nearly *verbatim* by a judge who fails to discharge his obligation to independently adjudicate a prisoner's constitutional claims.

The panel majority's holding that state proceedings need not be full or fair before the AEDPA's provisions may be applied encompassed not only §2254(e)(1), but also §2254(d). *See Valdez*, 274 F.3d at 951 ("we hold that a full and fair hearing is not a precondition . . . to applying §2254(d)'s standards of review"). As the dissents from the panel opinion and from the denial of rehearing *en banc* persuasively explain, this holding runs contrary to fundamental fairness, and to the comity concerns underlying the AEDPA.

The function of the limitation on relief mechanism established by §2254(d) is to advance the interests of comity by shifting the primary obligation for adjudicating claims of constitutional error to the state courts. *Cf. Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) ("application of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum"). In return for

shouldering this burden, §2254(d) promises state judges who responsibly discharge their obligation to adjudicate constitutional claims that their decisions will be respected – that is, that a decision denying relief will not be disturbed by a federal court unless that decision was contrary to, or involved an unreasonable application of federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. §2254(d)(1) and (2).

Where, as in this case, a state court plainly abdicates its obligation to responsibly examine and decide a petitioner's constitutional claims, however, application of the heightened respect embodied in §2254(d) leads to perverse results. *Cf.* (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 437 (2000) ("comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable to develop his claim in state court despite diligent effort"). By its plain terms, §2254(d) is applicable if, and only if, a petitioner's claim was "*adjudicated* on the merits," and that "adjudication" resulted in a "*decision*" by the state court. This choice of language indicates that Congress envisioned the increased respect for state court decisions embodied in §2254(d)'s limitation on relief as a two way street: if a state court takes its duty to protect federal constitutional rights seriously, then its decision should be treated with respect; however, if the state court abdicates that responsibility by permitting a party to the proceedings to act as both litigant and decision-maker,[8]

[8] If ever there has been a case of state-court abdication of adjudicatory responsibility, this case is it. The state habeas judge did not preside over petitioner's trial, and therefore had no independent

(Continued on following page)

then the availability of relief in subsequent federal habeas proceedings must not be encumbered by heightened respect for an indifferent state court judge.

Congress' use of different words to describe the requisite action taken by a state court ("adjudication") and the necessary result of that action ("decision") conveys important meaning. *See, e.g., Molzof v. United States*, 502 U.S. 301, 307 (1992) (Congress is presumed to know the meaning attached to the words it chooses); *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638, 645 (1990) ("basic principles of statutory construction ... require giving effect to the meaning and placement of words chosen by Congress"). An "adjudication" is a process whereby a judge receives and independently assesses factual and legal information from the litigants, considers the strengths and weaknesses of each side's positions, and formulates a judicial conclusion – a "decision" – reflecting the outcome of the judge's deliberations. *See* Black's Law Dictionary 39 (4th ed. 1979). Thus, what is embodied in the terms "adjudication" and "decision," and what is therefore manifested through Congress' selection of these words, is an expectation that state courts themselves will be meaningfully involved in the activity of moving from presentation of evidence, to evaluation of evidence, to application of law to facts, and finally to formulation of conclusions

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knowledge of the proceeding in which petitioner was convicted and sentenced to death. Notwithstanding this lack of familiarity with the facts and record of the case, the state habeas judge adopted the respondent's proposed findings without even reading the record, and without considering the exhibits, which the court had lost at some point during the nearly seven year interval between the state habeas evidentiary hearing and the denial of relief.

based upon what has transpired. *See* C. Wright & A. Miller, Federal Practice and Procedure §2578 (2d ed. 1995) ("All courts agree that finding the facts is an important part of the judicial function and that the judge cannot surrender this function to counsel").

That Congress chose these words and, more importantly, the meanings they carry, is not surprising. For §2254(d)'s limitation on relief to be constitutionally justifiable, it must be evident both from the state court's decision (the end result) as well as from the adjudication of the claims (the process out of which the result emerged) that it is the product of fair, full, and meaningful judicial consideration. Only by building this requirement into the mechanism triggering the applicability of §2254(d) could Congress be assured that federal courts will not be reduced to mindlessly rubber-stamping state court denials of relief without regard for the circumstances surrounding the state court's action. *Cf. Ward v. Trent*, 19 F.Supp.2d 608, 612 (S.D.W.Va. 1998) (expressing disapproval of reduction of federal habeas court's role "to the level of a rubber stamp that must dismiss a habeas petition unless the state court's findings stretch beyond the reason of any reasonable jurist").

The findings and conclusions prepared by the respondent in this case, and adopted by the state habeas court, bear none of the characteristics of a fair or responsible adjudication of the merits of petitioner's claims. In fact, the available information indicates that the state habeas court's involvement in the process of rendering findings and entering judgment was confined to little more than placing a signature on a document crafted by a partisan litigant. *See Rudenko v. Costello*, 286 F.3d 51, 75 (2nd Cir. 2002) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 572

(1985)) (recognizing "the 'potential for overreaching and exaggeration on the part of attorneys,' frequently exhibited when they are preparing findings of fact after learning that the judge has decided in their favor"). Under these circumstances, there is simply nothing about the state court's disposition that is worthy of the heightened respect contemplated by §2254(d); on the contrary, the state court's handling of petitioner's claims – especially when viewed in the light of the district court's subsequent determination that petitioner's Sixth Amendment right to effective assistance of counsel had been violated – demonstrates conclusively that the state court did not conscientiously discharge its obligation to adjudicate petitioner's claims.[9]

*Amicus* submits that forcing federal courts to apply §2254(d)'s limitation on the power to grant habeas relief in cases as egregiously mishandled as this one is inconsistent with comity principles underlying that provision's adoption, and with the principles of fundamental fairness and equity which have always informed this Court's habeas decisions. *See Fay v. Noia*, 372 U.S. 391, 438 (1963) ("habeas corpus has traditionally been regarded as governed by equitable principles"); *see also, e.g., Schlup v. Delo*, 513 U.S. 298, 320 (1995) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)) ("We firmly established the importance of the equitable inquiry required by the ends of justice in 'a trio of 1986 decisions' handed down on the same day")

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[9] *See Rudenko*, 286 F.3d at 76 ("the district court's adoptions of the State's memorandum of law in their entirety, without any indication of which argument or arguments the court found persuasive as to any given claim . . . provide virtually no assistance to this Court in the performance of our reviewing function").

(referring to *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Murray v. Carrier*, 477 U.S. 478 (1986); *Smith v. Murray*, 477 U.S. 527 (1986)). For these reasons, this Court should grant certiorari, and make clear that §2254(d) does not require federal courts to talismanically uphold "rubber stamp" denials of relief like the one entered by the state habeas court in petitioner's case.

### C. The limitation on relief set forth at 28 U.S.C. §2254(d) should not govern a federal district court's consideration of claims as to which the district court properly holds an evidentiary hearing and takes evidence not considered by the state habeas court.

In addition to requiring application of §2254(d) and §2254(e)(1) notwithstanding the absence of any indicia that a petitioner's state court proceedings were full or fair, the panel majority's opinion also declared that §2254(d)(1) and (2) apply even where a district court properly holds an evidentiary hearing at which new evidence relevant to a petitioner's claims is introduced. The majority stated, without elaboration, as follows:

> Where a district court elects, in instances not barred by §2254(e)(2), to hold an evidentiary hearing, the hearing may assist the district court in ascertaining whether the state court reached an unreasonable determination under either §2254(d)(1) or (d)(2). An evidentiary hearing is not an exercise in futility just because §§2254(d) and (e)(1) require deference.

*Valdez*, 274 F.3d at 952. These declarations ignore serious – indeed insurmountable – problems of implementation, and in so doing, arrive at a result which is clearly wrong.

Neither §2254(d)(1) or (d)(2) can sensibly be applied when a district court takes new evidence relevant to a petitioner's claim for relief.[10] First, as this Court's decisions in (*Terry*) *Williams* and *Cone* make clear, §2254(d)(1)'s "contrary to" clause is concerned with choice-of-law issues, and with the state court's failure to resolve a "materially indistinguishable" claim in the manner chosen by this Court in a previous case. *See Williams*, 529 U.S. at 405; *Cone*, 122 S.Ct. at 1850. Neither of these inquiries is meaningfully informed by evidence the state court did not have, since the state court's "adjudication" of the petitioner's claim could not have been influenced by such evidence.

Similarly, §2254(d)(1)'s "unreasonable application" clause is functionally confined to an examination of the evidence and law that were before the state court. *See Williams*, 529 U.S. at 407 ("Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case"). Here again, a state court simply could not have applied the law to facts it was not actually considering, and the state court could not have been considering facts whose presentation did not occur until the petitioner's federal habeas proceedings.

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[10] In this case, the evidence petitioner presented during the federal evidentiary hearing was virtually identical to that presented during the state habeas hearing. The respondent, however, presented additional evidence not offered during the state court proceeding.

The inapplicability of §2254(d)'s limitation-on-relief mechanism to claims for which additional evidence is taken in a federal evidentiary hearing is even better illustrated by subdivision (d)(2), which is expressly concerned only with the reasonableness of a state court's factual determinations "in light of the evidence presented in the State court proceeding." Nothing about the inquiry mandated by §2254(d)(2) calls for, or allows room for, consideration of evidence presented for the first time in federal habeas proceedings. Indeed, it would be impossible to abide by subdivision (d)(2)'s express limitation while simultaneously considering evidence properly presented in a federal evidentiary hearing.

More fundamentally, apart from the impossibility of correctly applying §2254(d) to claims whose evidentiary basis has been expanded (or laid down for the first time) in federal habeas proceedings, application of that provision in these circumstances would make no sense. When a federal district court determines that an evidentiary hearing is appropriate, it has necessarily determined (a) that the facts to be developed at the hearing will, at the very least, assist the court in accurately adjudicating the petitioner's constitutional claim, *see Townsend*, *supra*, and (b) that the absence from the state court record of the facts necessary to resolve that claim is not attributable to the petitioner or his counsel, *see* §2254(e)(2).[11] The panel majority's declaration notwithstanding, to permit fact development in these

[11] It bears emphasis that, in this case, the respondent did not challenge the correctness of the district court's decision to hold an evidentiary hearing on petitioner's allegations. *See Valdez*, 274 F.2d at 948.

circumstances, but then require the district court to confine its analysis to the parameters outlined in §2254(d)(1) and (2) – which, as discussed above, provide no means of accounting for evidence that was not considered by the state court – is "an exercise in futility." *Valdez*, 274 F.3d at 952. For this reason as well, *amicus* submits that this Court should grant the writ of certiorari and correct the panel majority's misconceptions about the applicability and operation of §2254(d).

## CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should grant Alberto Valdez' petition for a writ of certiorari.

Respectfully submitted,

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In The

# Supreme Court of the United States

ALBERTO VALDEZ,

*Petitioner,*

v.

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## I. The State Habeas Court's Failure to Provide a Full and Fair Hearing Is Evident from the Record, Was Found by the District Court, and Was Never Questioned by the Court Below.

The Brief in Opposition begins by attempting to convince the Court that the procedures employed by the state habeas court were not all that bad – that the Petition for Writ of Certiorari has somehow distorted the record and misled the Court. This assertion flies in the face of the federal district court's express finding that Valdez did not receive a "full and fair" evidentiary hearing in state court (App. 82), a finding the Fifth Circuit never questioned (App. 9-10).

The principal supposed "distortion" is Valdez's claim that the state habeas court "admittedly and unapologetically" refused to consider the evidence most material to Valdez's ineffective assistance claim – the transcript of the sentencing phase of the capital murder trial. (Br. at 3, n.2) The record of what occurred, however, could not be clearer. The state habeas judge admitted, without apology, that he simply would not take the time to review the sentencing phase transcript from Valdez's capital murder trial, even though he had not presided at that trial, even though the character of what occurred during the sentencing phase was sharply disputed by the parties, and even though what occurred (and did not occur) was central to Valdez's ineffective assistance claim. In the state judge's own words:

> I have never read the record of the trial and I don't intend to. I don't have the time.

(App. 81; 2/28/97 SF 144-145) Based on this clear admission by the state habeas judge, the federal district court found that the state habeas court had "effectively excluded from evidence some of the most critical evidence of ineffective assistance of counsel" (App. 84; 3 R 23; 2 R 471), and that the excluded evidence demonstrated "the stark lack of preparation of defense counsel for the sentencing phase as well as the prejudice resulting from the lack of preparation" (App. 84, n.19). The Fifth Circuit never questioned these findings.

Nonetheless, as evidence of this supposed distortion, the Brief in Opposition quotes a statement by the state habeas judge that he indeed intended to look at a transcript. (Br. at 3, n.2) But the transcript he intended to examine was not of the sentencing phase of Valdez's capital murder trial (over which he did not preside). Instead, the state habeas judge said he would examine the transcript *of the state habeas hearing* (over which he did preside nearly seven years before).[1] Whether the state habeas judge made good on even this minimal commitment to look at *some* of the evidence is doubtful, however, given that the judge made a similar commitment at the same time to also look at the exhibits introduced during the state habeas hearing – a commitment he demonstrably ignored.

The state habeas judge admitted that he could not find the exhibits that were introduced during the evidentiary hearing nearly seven years earlier, that he needed to review the exhibits themselves and not simply read competing descriptions of their contents, and that if he could not find the exhibits he would need to request copies from counsel. (2/28/97 SF 148-149)[2] Nonetheless, without

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[1] The focus of the state habeas hearing was on presenting the case in mitigation that should have been presented at Valdez's capital murder trial. To determine Valdez's ineffective assistance claim, the state habeas judge would need to compare the evidence that was available, as revealed during the state habeas hearing, with that actually presented during the capital murder trial by reviewing the transcript of the sentencing phase of that trial. Simply reviewing the transcript of *the habeas hearing* would not have revealed what had occurred during the *sentencing phase of the trial*, and thus the state habeas judge was in no position to make the necessary comparison.

[2] The record reveals the following colloquy:

> The Court: Okay. I have gone through the four files and I did not find the exhibits. If I can't find them, you have copies.
>
> Mr. Levinger [Counsel for Valdez]: We can resubmit.
>
> . . .

(Continued on following page)

ever locating the exhibits or requesting replacements, the state habeas court proceeded to deny Valdez's petition, making findings of fact and conclusions of law that, as the district court found, "essentially repeated verbatim the State's proposed findings and conclusions." (App. 81)[3] Indeed, the court reporter acknowledged two weeks after the state habeas court's ruling that the court's staff had been unable to locate any of the exhibits. (2 R 534-535)

The missing exhibits included evidence central to Valdez's claim of ineffective assistance. Had the state habeas court examined these exhibits, it would have seen that Valdez had been diagnosed as mentally retarded by the Corpus Christi schools when he was 13 – a diagnosis based on tests revealing an IQ of 63 and leading to a conclusion that Valdez was "educable mentally retarded." (App. 71-72) The missing exhibits also included tests administered to Valdez when he was 18, once again revealing an IQ of 63.

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> Ms. Smith [Counsel for the State]: I've got an exhibit list somewhere, Your Honor.
>
> The Court: Well, *I need to see the exhibits themselves*. I'll have somebody find them and you can expect an answer within maybe a couple of weeks.

(2/28/97 SF 148-149) (emphasis added)

[3] Although the Brief in Opposition also accuses Valdez of "misrepresenting" the record by characterizing the state habeas court's findings as a rubberstamp of the State's proposed findings, the federal district court, after examining the record, expressly found that the state habeas court's findings were taken essentially verbatim from the State's proposed findings. (App. 81) This finding was clearly supported by the record, which showed that the changes made by the state habeas judge were entirely either matters of form (breaking single paragraphs into separate paragraphs, thereby creating the impression of having added paragraphs), or the addition of a handful of immaterial or conclusory observations. In any event, whether the state habeas judge adopted the State's proposed findings and conclusions was not the basis for the district court's conclusion that Valdez had not received a full and fair hearing. That conclusion was based instead on the state habeas court's actions that effectively excluded from consideration much of the evidence most material to Valdez's ineffective assistance claim.

(App. 72) Finally, the state habeas court would have learned from time records contained in the missing exhibits that Valdez's trial counsel spent a grand total of 59 hours preparing to defend his life and that, as the district court found, "none of this preparation time was spent searching for mitigating evidence in connection with the sentencing phase." (App. 76)

Based on this evidence, the federal district court found that "the judge denied Valdez' petition without seeing evidence which might have been favorable to Valdez, which the judge did not rule must be excluded, and which the judge even indicated had to be reviewed." (2 R 470) The district court further concluded that:

> the state habeas court did not adequately develop the factual record during the habeas proceedings. Further, it appears that this failure prevented Valdez from being able to make material evidence part of the record with respect to his claim for ineffective assistance of counsel.

(2 R 473) Once again, the Fifth Circuit did not (and could not) question these findings and conclusions. (App. 9-10) The deficient state habeas record in this case is thus precisely as Valdez described it in his Petition for Writ of Certiorari.

## II. The Fifth Circuit's Interpretation of the AEDPA Effectively Requires Federal Courts to Ignore the Evidence Presented During Mandatory Federal Evidentiary Hearings.

In an effort to justify the Fifth Circuit's erroneous interpretation of the AEDPA, the Brief in Opposition attempts to create the impression that (1) the evidentiary hearing conducted by the district court was discretionary rather than mandatory (Br. at 4), and (2) the purpose for this supposedly "discretionary" hearing was simply to assist the district court as a so-called "procedural safeguard" in evaluating the decision of the state habeas court (Br. at 13-16). Neither of these impressions is correct.

The federal evidentiary hearing in this case was not a discretionary hearing held at the option of the district

court. Because the state habeas court had failed to provide Valdez with a full and fair hearing by refusing to review the sentencing phase transcript and then by losing the exhibits from the state habeas hearing before they could be reviewed, the federal court was *required* to conduct an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293, 316 (1963) (if the procedure employed by the state "appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's *duty* to disregard the state findings and take evidence anew."). Thus, the district court expressly concluded "that Valdez is *entitled* to an evidentiary hearing on his claim for ineffective assistance of counsel" because he had not received a full and fair state court hearing. (2 R 473-474) (emphasis added) (*see also* App. 82) Indeed, the Fifth Circuit acknowledged that "the district court concluded that, under *Townsend v. Sain*, an evidentiary hearing was mandatory." (App. 5) (citation omitted)

Moreover, the purpose for this mandatory evidentiary hearing was not, as the Brief in Opposition suggests, simply to "facilitate federal review" of the findings of the state habeas court. (Br. at 8, 16) The review provisions of the AEDPA anticipate that state courts will provide appropriate hearings on material questions of fact and will make determinations on those questions. When state courts have provided full and fair hearings, the AEDPA relegates federal courts to performing a review function, much like an appellate court. There is a standard of review, and the review is restricted to the record created in the state court proceedings. *See* 28 U.S.C. § 2254(d)(2). The AEDPA does not, however, address what happens when the state habeas court has failed or refused to provide a full and fair hearing. For example, the AEDPA does not specify when a federal court is required to conduct its own evidentiary hearing, or what is the necessary consequence of a mandatory federal evidentiary hearing on the otherwise applicable standard of review. Those questions continue to be answered by pre-AEDPA precedents, such as this Court's decision in *Townsend v. Sain*. Under *Townsend*, if the federal court is required to conduct its own evidentiary hearing, it is no longer merely

performing a review function. It is now acting as a fact finder and the standards of review are inapplicable.

Indeed, if the review provisions of the AEDPA applied here, as the Fifth Circuit erroneously concluded, the mandatory federal evidentiary hearing would "facilitate" nothing, because in cases in which section 2254(d)(2) applies, a federal habeas court is expressly limited by the AEDPA to examining the record of proceedings before the state habeas court. *See* 28 U.S.C. § 2254(d)(2) (limiting review to whether the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*.") (emphasis added). If section 2254(d)(2) applied in every instance, regardless of whether the state habeas court ever considered the evidence presented to it, federal evidentiary hearings would serve no function at all because the evidence presented at a federal hearing could not considered by the federal court in reviewing the state court judgment. Only by recognizing that the AEDPA simply does not address when federal evidentiary hearings are required, or the necessary consequences of conducting such a hearing, can the Court reconcile section 2254(d)(2) with *Townsend*'s mandate that federal courts have a "duty to disregard the state findings and take evidence anew" when state courts have refused to provide full and fair hearings.[4]

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[4] The Fifth Circuit's confusion regarding how the AEDPA operates is perhaps best illustrated by its direction that on remand the district court must consider evidence that the State attempted to offer for the first time in the federal evidentiary hearing bearing on the issue of whether Valdez was mentally retarded. (App. 33-37) Under the AEDPA, this new evidence could be considered only if the deference provisions in section 2254(d) do not apply. If they do apply, section 2254(d)(2) expressly limits federal review to "the evidence presented in the State court proceeding." Thus, the Fifth Circuit's decision gives the State the benefits of the deference provisions found in the AEDPA with respect to Valdez's previously unconsidered evidence, but then relieves the State

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This correct interpretation of the AEDPA would not, as the Brief in Opposition urges, "wipe the slate clean" and permit the district court to ignore the state habeas court's findings. (Br. at 8) Quite to the contrary, in this case the district court properly determined to defer to those findings that were not tainted by the state habeas court's refusal to consider material evidence. (App. 84 & n.20) Indeed, it is the Fifth Circuit's interpretation of the AEDPA that would render meaningless the federal court's two-day evidentiary hearing – a hearing mandated only because the state habeas court refused to consider the evidence.

## III. The Conflict Between the Tenth and Fifth Circuits Is Real, Is Properly Before this Court, and Is in Need of Immediate Resolution.

Remarkably, the Brief in Opposition urges this Court to adopt a rule that review by writ of certiorari is not appropriate whenever the court below has remanded a case rather than rendered judgment. (Br. at 7-8) That is simply not the law. The Court has refused to review interlocutory orders when proceedings on remand might well eliminate any need for review and no good reason exists for immediate review of the order in question. But when, as here, the issue involved is "fundamental to the further conduct of the case," this Court has frequently reviewed interlocutory orders of remand. *See, e.g., Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (citing *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964); *Mazurek v. Armstrong*, 520 U.S. 968, 975-976 (1997). As explained by the late Justice White:

> where there is an important and clear-cut issue of law that is fundamental to the further conduct

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of the burdens found in those very same provisions with respect to the State's new evidence.

> of the case and that otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review.

*Randolph Central School District v. Aldrich*, 506 U.S. 965, 966-67 (1992) (White, J., dissenting from denial of certiorari, joined by Rehnquist, C.J., and O'Connor, J.).

One can hardly imagine a circumstance where this standard would more clearly be satisfied and where immediate review would more clearly be justified than here. Whether the AEDPA requires deference to state determinations, even when a federal evidentiary hearing is mandated because the state court refused to consider the evidence, is both an important and clear-cut question of law. The answer to this question is obviously fundamental to the further conduct of the case, because it tells the district judge whether she is free to independently evaluate the evidence presented at the mandatory evidentiary hearing, or whether she must ignore the evidence she sees and hears at that hearing and instead decide the issues presented based entirely on the state court record, giving deference to the state court's findings.

Moreover, the answer to the question presented is fundamental not just in this case, but in cases throughout the Fifth Circuit, and indeed, the United States. The course of habeas cases presently pending throughout the country depends on the answer to this question, as the Brief of Amicus Curiae Paul Richard Colella vividly illustrates. At present, the answer to this important question varies, depending on where the petitioner is located. Although the Brief in Opposition makes the bold assertion that "none of the Tenth Circuit decisions offer a statutory construction contrary to that of the Fifth Circuit" (Br. at 12), the Fifth Circuit itself acknowledged that its decision is in direct conflict with that of the Tenth Circuit in *Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998). (App. 24-25) As a result of this conflict, whether a person sentenced to death receives independent review of his or her federal constitutional claims by a court actually willing to examine the record presently depends on whether that person is sentenced to death in Oklahoma (the Tenth

Circuit) or acr ss the state line in Texas (the Fifth Circuit).[5] Because the quality of the American system of criminal justice is grossly denigrated if a person can be put to death based on the findings of a state court that refused to consider the evidence before it, the conflict between the Fifth and Tenth Circuits cannot await another day to be resolved.

## IV. Whether the Fifth Circuit's Decision Renders the AEDPA Unconstitutional Is an Important Question of Federal Law that Has Never Been Addressed by this Court and that Valdez Presented to the Court Below.

Although the Brief in Opposition asserts that Valdez never raised in the court below the constitutional problems created by that court's interpretation of the AEDPA (Br. at 18), that is simply not true. In his principal brief filed in the Fifth Circuit, Valdez pointed out that any departure from Fifth Circuit precedent requiring independent federal review of federal constitutional claims when a state habeas court had failed to conduct a full and fair hearing would render the AEDPA unconstitutional. (Appellee's Br. at 58) Thus, when the court below unexpectedly departed from its existing precedents to hold that the AEDPA requires deference even when the state habeas court has refused to consider the evidence, the dissent pointed out that the majority's interpretation of the statute raised serious constitutional questions. (App. 60-61) Once

[5] The Brief in Opposition further asserts that this conflict does not warrant the Court's attention because "[n]othing in *Miller* engages, much less refutes, the statutory-construction analysis conducted by the Fifth Circuit." (Br. at 11) This assertion ignores the fact that *Miller* was decided over two years before the Fifth Circuit decision in this case. Because the reasoning of the Fifth Circuit was not anticipated – not even by prior panels of the Fifth Circuit that had reached the same sensible conclusion as the Tenth Circuit in *Miller* – it is difficult to see how the Tenth Circuit could have possibly "engaged" or "refuted" the unanticipated and later adopted approach of the Fifth Circuit.

the court below decided to depart from its own prior precedents, Valdez then pointed out in his Petition for Rehearing En Banc precisely the same constitutional problems with the court's interpretation of the AEDPA that he has now raised in his Petition for Writ of Certiorari. (Pet. for Rehearing at 13-15) And the dissent from denial of rehearing en banc acknowledged "the serious constitutional questions raised by the panel majority's interpretation of the AEDPA." (App. 117-118)

Moreover, contrary to the view expressed in the Brief in Opposition (Br. at 19), the Fifth Circuit's interpretation of the AEDPA would violate the Sixth Amendment, as applied to this case, by forcing Valdez to show more than what *Strickland* requires to establish an ineffective assistance of counsel claim – and to make this additional showing in his first full and fair opportunity to present that claim (Pet. at 27-29). The Brief in Opposition urges that this issue has already been decided in *Bell v. Cone*, 122 S.Ct. 1843, 1852 (2002). But that is not the case. The petitioner in *Bell* never demonstrated that the state habeas court failed to provide a full and fair hearing, and thus the issue raised here was not even present (much less decided) in that case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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